TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918 1919

No. [redacted] 8 [redacted] 61

WILLIAM T. WAGNER, EDWARD WAGNER, AND SOPHIE WAGNER, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF W. T. WAGNER'S SONS, PLAINTIFFS IN ERROR,

vs.

THE CITY OF COVINGTON.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 18, 1918.

(26,339)

(26,339)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 872.

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1 Be it remembered that heretofore to-wit, December 9th, 1916, the Appellants by attorney, filed in the Office of the Clerk of the Court of Appeals — styled William T. Wagner's Sons, Appellant, vs. City of Covington, Appellee, which is in words and figures as follows:

2 Court of Appeals of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Doing Business under the Name of W. T. Wagner's Sons, Appellants,

vs.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Appellee.

Statement.

1st. The names of appellants are William T. Wagner, Edward Wagner & Sophie Wagner, doing business under the name of W. T. Wagner's Sons.

2nd. The name of appellee is the City of Covington, a municipal corporation under the laws of the Commonwealth of Kentucky.

3rd. This is an appeal from a judgment of the Common Law and Equity Division of the Kenton Circuit Court, rendered May 15th, 1916, which judgment may be found on page 52 of the record.

4th. Appellants do not wish to have a summons issued or warning order made.

MACKOY & MACKOY,
Attorneys for Appellants.

3 Pleas Before the Honorable the Kenton Circuit Court at the Court-house, in Covington, on June 5, 1916.

Hon. M. L. Harbeson, Judge Common-law & Equity Division.

#15418.

WILLIAM T. WAGNER, EDWARD WAGNER, and SOPHIE WAGNER, Doing Business under the Firm Name of W. T. Wagner's Sons,

vs.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky.

Be it remembered that on May 15, 1914, plaintiff filed its petition herein, which is as follows:

WILLIAM T. WAGNER, EDWARD WAGNER, and SOPHIE WAGNER, Doing Business under the Firm Name of W. T. Wagner's Sons, Plaintiffs,

vs.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Defendant.

Petition in Equity.

Plaintiffs, William T. Wagner, Edward Wagner, and Sophie Wagner, are partners under the firm name of W. T. Wagner's Sons and engaged in the business of manufacturing, bottling, selling
4 and delivering, seltzers, vichy, lithia, hunyadi, ems, sodium phosphate, distilled and all kinds of artificial, mineral and medicinal waters, all which waters are commonly known and described as "soft drinks." Defendant, the City of Covington, is a municipal corporation of the second class organized under the laws of the State of Kentucky.

Plaintiffs are now and at all times hereinafter mentioned have been engaged in carrying on a part of its said business in said city of Covington, Kentucky. Said part of said business carried on at said times in said city consists and has consisted of the following particulars, and is and has been carried on in the following manner, to-wit:

Plaintiffs, by vehicle, deliver said waters and drinks, or such part thereof as may be sold, to certain persons in said city of Covington upon contracts of sale therefor, which contracts are made, except as hereinafter mentioned, by orders received at plaintiffs' factory and bottling works in the City of Cincinnati, State of Ohio. Said orders are received in said last mentioned city by and through solicitors and drivers of plaintiffs, or by and through the post-office or telephone.

At the times when said orders are received and said contracts made, all said waters and drinks, except as hereinafter mentioned, or the constituent parts thereof, are situated in said State of Ohio, and subsequently to the execution of said contracts and in performance thereof, said waters and drinks are carried by plaintiffs from
5 said State of Ohio, by vehicle as aforesaid and delivered to said persons ordering them in said city of Covington, Kentucky.

With the exceptions hereinafter mentioned, all the persons to whom said waters and drinks are delivered, as aforesaid, are regular customers of plaintiffs, to whom their said vehicle makes visits three times each week for the purposes of soliciting orders from them through the drivers of said vehicles and of delivering waters and drinks to them, which have been previously ordered, and by far the largest proportion, of said regular customers or retail dealers in said waters and drinks. By general arrangement made through standing orders given prior to or at the time of beginning deliveries to some of said regular customers, plaintiffs keep them supplied with said waters and drinks without any specific orders being given in advance of

each of said visits, and at the time of their said visits to said customers plaintiff's said drivers, in accordance with said general arrangement, deliver to said customers so much of said waters and drinks as each of them may need, but all of said waters and drinks are of the same kind as those called for in said standing orders and delivered upon the same terms in all respects and for the same prices and at the same credits as specified in said standing orders. For the purpose of filling said standing orders under said general arrangement said vehicle of plaintiffs carries a sufficient amount of said waters and drinks, but, with the exception of said waters and drinks, so carried, loaded on its said vehicle and in process of trans-
6 portation, plaintiffs at no time have or ever have had any waters or drinks not sold previous to time of delivery in said State of Kentucky, and does not maintain and never has maintained any factory, bottling works, ware house, store-room, office or other place of business in said last mentioned state and does not and never has manufactured said waters and drinks in said state. Plaintiffs at no time in said state, except as aforesaid and as hereinafter mentioned, solicits or has solicited any sales of its said waters and drinks, nor offers nor exposes nor has offered or exposed and for sale to the general public, nor to any purchaser who will buy them, nor carries them about for said purposes, the only exception being that plaintiff-on-e in a while sell a case of said waters and drinks from its said vehicle to some person asking to purchase same or to some person who has been solicited to become or who has signified that he would or might be found a regular customer of said waters and drinks if those so sold to him should prove satisfactory.

All said waters and drinks are manufactured and bottled by plaintiffs at their factory and bottling works in said city of Cincinnati, state of Ohio, or there put in covered and fastened bottles and siphons and there packed in separate and distinct wooden or metal packages or cases, each case or package contains a certain number of bottles, as the nature and form of the particular waters or drinks may require, and according to the custom of plaintiffs and of those persons
7 who manufacture and sell said waters and drinks and who constitute the trade in general, and are then shipped in plaintiff's said vehicle and delivered by plaintiff's drivers from said vehicle to plaintiff's said customers in said city of Covington, state of Kentucky in the same form and shape as that in which they have been shipped and carried, said packages or cases continuing and remaining unbroken in said original form and shape at all times from said point of shipment to said point of delivery, and none of said packages or cases are ever sold or delivered except as an entirety.

On the 30th day of April, 1910, defendant passed, adopted and approved an ordinance entitled "An ordinance fixing and imposing licenses upon certain occupations, professions, and trades, prescribing *in* manner of the issuing of such licenses and apportioning the revenue realized therefrom," said ordinance being No. 2896, and containing the following provisions, to-wit:

"Section 1.

"Be it ordained by the General Council of the City of Covington, that after the passage of this ordinance no person shall be engaged in any trade or profession hereinafter mentioned till he, she or they shall have obtained a license therefor, as hereinafter provided".

"Section 2.

"Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon convicting thereof shall be punished in the Police Court by a fine of not more than fifty dollars nor less than ten dollars".

8 "Section 4.

"Every person having a license under the provisions of this ordinance shall exhibit the same at all times while in force in some conspicuous part of his, her or their place of business, and shall produce the same when applying for a renewal, or when requested to produce it by any municipal officer or member of the Police Department".

"Section 5.

"All licenses excepting for places of amusement, performances or exhibitions, shall date from the first day of May of each year, and shall be issued for one year from the aforesaid date".

"Section 6.

"It at any time it shall be made to appear to the satisfaction of the mayor that any licensed person has violated any of the provisions of the ordinance, then the mayor can revoke his, her or their license".

"Section 8.

"Each person, firm, company or corporation, carrying on, conducting or managing in the city of Covington, any business, calling, occupation, or profession hereinafter named, shall pay the license fee, hereinafter stated, or set opposite the business, calling, occupation or profession named hereinafter.

Whenever any business, calling, occupation, or profession is covered by both a general term and a specific term named herein, it shall be the duty of any person, firm, company or corporation carrying on, conducting or managing such business, calling, occupation or profession, to pay the license fee required under the specific term named hereinafter.

9 Whenever in this ordinance each individual of a company, firm or co-partnership, is required to pay a certain license

fee, then a license fee paid by said company, firm or co-partnership, of which such individual is a member or co-partner for the same line of business, calling, occupation or profession shall not relieve such individual of the obligation to pay such license fee, nor of any of the terms, obligations or penalties herein imposed."

"Section 9.

"The business, calling, occupation and professions, license for which is required herein, together with the amount annually, except as otherwise specifically, set out, to be charged, is as follows:

30 Wholesale dealers in soft drinks and manufacturers of same $150.00

"Section 31.

"It shall be the duty of the license inspector and all police, and other officers clothed with police powers to enforce the provisions of this ordinance."

"Section 32.

"All licenses granted under the provisions of this ordinance shall expire on the first day of May of each year and if the same is renewed between the fifteenth day of May and the first day of June, the said license shall bear a penalty of ten per cent, and if renewed between the first day of June, and the fifteenth day of June or thereafter, the said license shall bear a penalty of fifteen per cent, and the city clerk and license inspector are hereby instructed to see that the provisions of this section, are strictly carried out, and any person, persons or company, or corporation taking out a license after May first each year and paying the penalty above specified shall not be relieved from the liability for the fine as provided in this ordinance."

10 "Section 33.

"All revenue realized hereunder shall go to and be for the benefit of the funds and in the amounts prescribed by the apportionment ordinance passed by the general council of the City of Covington, apportioning the revenue for said city, for the year in which said licenses are collected."

In accordance with said provisions of said ordinance which was in full force and effect during the years hereinafter mentioned, and before being permitted to carry on its said business in said city, plaintiffs were compelled by defendant to take out and pay for and did, being so compelled and both plaintiff and defendant believing the plaintiffs were compelled to pay same, take out and pay for licenses for carrying on its above described business in said city of Covington during the years 1910-1911, 1911-1912, 1912-1913, 1913-1914.

The amounts paid for said licenses by plaintiffs, and the — when same were paid were as follows: viz:

May 14, 1910	$150.00
May 4, 1911	$150.00
May 3, 1912	$150.00
May 15, 1913	$150.00
	$600.00

Said provisions of said ordinance did not and could not apply to any business carried on by plaintiffs in said city during any of said years for the reason that the plaintiffs were not at or during said time, or any part thereof, engaged in business in said city as whole-
11 sale dealers in soft drinks, or as manufacturers in said city, were invalid, illegal, unconstitutional and in contravention of Article I, Section 8, Para. 3, of the Constitution of the United States of America in that said business of plaintiffs in said city is and was at and during said times interstate commerce, and said provisions, as to plaintiff's said business, amounted to and were a restraint upon and regulation of interstate commerce.

No part of said sum of six hundred dollars ($600.) has ever been repaid to plaintiffs, although repayment thereof has been demanded of defendant.

On the 30th day of April, 1914, defendant passed, adopted and approved an ordinance entitled "An Ordinance relating to the licensing of certain occupations, professions and trades in the City of Covington, Kentucky," which is now in full force and effect being No. 94, and containing the following provisions, to-wit:

"Section 1.

"That it shall be unlawful for any person to engage in any occupation, profession or trade hereinafter mentioned, without first obtaining a license therefor, as hereinafter prescribed."

"Section 2.

"All persons engaged in carrying on, conducting, or managing in the city of Covington, Kentucky, any business, calling, occu-
12 pation, profession or trade, hereinafter named, shall apply for a license to be granted by said city to said applicant, and pay therefor the fee hereinafter set out, or set opposite said business, calling, occupation, profession or trade, before said person shall so engage.

"Whenever any business, calling, occupation, profession or trade, is covered by both a general term and specific term named herein, it shall be the duty of any person so engaged to apply for and pay the license fee required under the specific term named herein."

"Section 4.

"All licenses granted herein shall date from the first day of May of each year, and shall be issued for a period of one year therefrom. Provided, however, that where a rate per diem, or for a shorter period than one year is made, said license may be issued for one or more days at the prescribed rate."

"Section 5.

"All licenses granted under the provisions of this ordinance shall expire on the first day of May of each year, subsequent to the issue of said license, and if the same is renewed between the 15th day of May and the first day of June, the said license shall bear a penalty of ten per cent (10%); and if renewed on or after the first day of June, the said license shall bear a penalty of fifteen per cent (15%). Any person taking out a license after the first day of May of each year and paying the penalty above specified, shall not be relieved from the liability for time imposed for operating without a license as provided in this ordinance."

13 "Section 7.

"Every person granted a license hereunder, shall exhibit the same at all times in some conspicuous part of his, her or thier place of business, and shall produce the same when applying for a renewal, or when requested by any municipal officer, or member of the Police Department of the City of Covington."

"Section 8.

"The conviction and punishment of any person for transaction of any business without a license, shall not exempt such person from the payment of any license fee, due or unpaid at the time of said conviction."

"Section 11.

"For the purpose of this ordinance the word "Person" shall be deemed to mean any person or persons, firm, individual or individuals, partnership, company, society, association or joint stock company."

"Section 12.

"Any person who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished in the Police Court by a fine of not less than ten ($10.00) Dollars, nor more than fifty ($50.00) Dollars."

"Section 13.

"The business, calling, occupation, profession or trades, licenses for which is required herein, together with the amount annually, except as otherwise specifically set out, to be charged for same, is as follows:

14 Soft drinks—Manufacturers—Wholesaler $150.00.

"Section 14.

"All revenue realized hereunder shall go to and be for the benefit of the funds and in the amounts prescribed, by the apportionment ordinance passed by the Board of Commissioners, apportioning the revenue for said city for the year in which said licenses are collected."

"Section 15.

"This ordinance shall take effect and be in force from and after its passage and due recordance."

Presumably in accordance with said provisions of said ordinance and since the passage and approval thereof, plaintiffs have been notified by defendant that they will be compelled to take out and pay for a license for the year beginning May 1st, 1914, before being permitted to carry on its said business in said city during said year, the amount of which license will be one hundred and fifty dollars, ($150.00), and defendant, through its officers and agents, is threatening to and will cause and procure the arrest and prosecution of plaintiffs and their drivers and agents and threatening to enforce and will enforce against them the penalties mentioned and provided for in said ordinance, unless plaintiffs shall comply with the term thereof and take out and pay for said license.

Said provisions of said ordinance do not and cannot apply to any business which is and will be carried on by plaintiffs in said city during said year for the reason that plaintiffs are not and will not at or during said time or any part thereof, be engaged in busi-
15 ness in said city as wholesale dealers in soft drinks or as manufacturers of same.

Said provisions of said ordinance, in so far as it is or may be attempted to apply them to the business of plaintiffs in said city, are invalid, illegal, unconstitutional, and in contravention of Article I, Section 8, para. 3, of the Constitution of the United States of America in that said business of plaintiffs in said city is and will be at and during said time interstate commerce, and said provisions, as to plaintiffs' said business, amount to and are a restraint upon and regulation of interstate commerce.

If said ordinance shall be enforced against plaintiffs for the year beginning May 1st, 1914, and on the same basis in after years,

plaintiffs will be compelled to pay to said city the sum of One Hundred and fifty dollars ($150.00) for a license to carry on its said business therein each year or plaintiffs will not be permitted to carry on its said business therein, and said —, which is very valuable, will suffer great and irreparable loss and injury in consequence and as a result of the enforcement of said ordinance. Plaintiffs will also be required to bring a multiplicity of actions to recover from said city the amounts of said licenses which may be paid by them. Plaintiffs have no adequate remedy at law to avoid a multiplicity of such actions, or to prevent the enforcement of said ordinance, or to prevent the threats and attempts of the defendant and its officers and agents, to arrest and prosecute plaintiffs and
16 their drivers and agents in the enforcement thereof, or to secure their own rights; and the only adequate remedy which they have in the premises, and to avoid such multiplicity of actions is an injunction to restrain defendant and its officers and agents from enforcing said ordinance and to restrain defendant, its officers and agents, from in any way interfering with, molesting, arresting or prosecuting plaintiffs and their drivers and agents while carrying on plaintiffs' said business in said city.

No injunction to restrain the acts of defendant complained of in this petition, nor to restrain defendant from the enforcement of said ordinance or from arresting, prosecuting, molesting or interfering with plaintiffs and their drivers and agents, while carrying on plaintiffs' said business, has ever been refused by this Court nor by any Court nor by any Circuit Judge nor any Judge.

Wherefore, Plaintiffs pray judgment against defendant, the City of Covington, for said sum of six hundred dollars, ($600.00), with interest *in* $150.00 thereof from May 4, 1910, until paid, interest on $150 thereof from May 4, 1911, until paid, interest on $150, thereof from May 3, 1912 until paid, interest on $150, thereof from May 15, 1913, until paid, and their costs herein, and is as much as plaintiffs are without any adequate remedy in the premises, except
17 in a Court of Equity, they pray that the said provisions of said last mentioned ordinance may, for the reasons herein stated, be held null and void and of no effect in so far as they, or any of them, relate to the said business carried on by plaintiffs in said city of Covington; and plaintiffs pray that said city and its officers and agents may be restrained and enjoined from enforcing the said provisions of said ordinance in so far as they relate to their said business and from interfering with, molesting, arresting or prosecuting them, their drivers and agents while carrying on same; and plaintiffs pray that a temporary injunction may be granted restraining said city, its officers and agents from arresting, prosecuting, molesting or interfering with them, their drivers and agents, while carrying on said business; and plaintiffs further pray that, on the final hearing of this cause, such injunction be made perpetual; and that they may have such other general and special equitable relief as the nature of their case may demand.

MACKOY & MACKOY,
Attys. for Plaintiff.

STATE OF OHIO,
Hamilton County ss

Wm. T. Wagner, being first duly sworn, says that he is one of the plaintiffs named in the foregoing petition and that the
18 statements contained in said pleading are true.

WILLIAM T. WAGNER.

Subscribed and sworn to before me and in my presence this 14th day of May, 1914.

[SEAL.] GEO. T. POOR,
N. P. in and for Hamilton County, Ohio.

My Commission expires Jan. 25th, 1916.

19 *Return.*

Executed the within Summons, May 15th, 1914 on City of Covington, by delivering a true copy hereof to George (Pat) Phillips, Mayor of the City of Covington.

JOHN ALLISON,
Sheriff Kenton County.
By THOS. J. KENNEY, *D. S.*

Thereupon on the same day May 15, 1914, a Summons issued and was afterwards returned as follows:

20 *Summons.*

The Commonwealth of Kentucky to the Sheriff of Kenton County:

You are commanded to Summon, City of Covington, to answer in twenty days after the service hereof, a petition in equity filed against it by Wm. T. Wagner, Edward Wagner, and Sophie Wagner, partners doing business under the firm name of W. T. Wagner's Sons, in suit numbered #15,418 in the Kenton Circuit Court at Covington, and warn its officers that upon failing to answer, said petition will be taken as confessed, or they will be proceeded against for contempt.

Witness, the Clerk of said Court, this 15th day of May, 1914.

WM. MACKE, *Clerk.*
By BEN MACKE, JR., *D. C.*

Return.

Executed the within Summons May 15th, 1914, on City of Covington, by delivering a true copy hereof to George (Pat) Phillips, Mayor of the City of Covington.

JOHN ALLISON,
Sheriff Kenton County.
By THOS. J. KENNEY, *D. S.*

21 *Order Filing Answer.*

At a sitting of said Court on the same day, December 14, 1914:

"Defendant filed in open Court, Answer."

22 Said Answer is as follows:

Answer.

"Now comes the defendant, City of Covington, and for answer to the petition herein, denies that the said alleged part of said business carried on at said times in said city, consists, or has consisted, of the following particulars, or is, or has, been carried on in the following manner, to-wit: Defendant denies that plaintiffs delivery by vehicle said waters or drinks, or such part thereof as may be sold to certain persons in the City of Covington, upon contract of sale therefor; denies that said alleged contracts are made by orders received at plaintiff's factory or bottling words in Cincinnati, Ohio, by or through solicitors or drivers of plaintiffs, or by — through the post-office or telephone.

Denies that at the time when said orders are received, or said contracts made, that all of said waters or drinks, or the constituent parts thereof, are situated in Ohio; denies that subsequent to the execution of said alleged contracts, or in the performance thereof, same are carried by plaintiffs from Ohio by vehicle as aforesaid, or delivered to said persons ordering them in said city of Covington, Kentucky.

Denies that all persons to whom said waters or drinks are delivered as described in the petition, are regular customers of plaintiffs; denies that their said vehicle visits same three times, or any time, each week, for, the purposes of soliciting orders from them, through the drivers of said vehicle, or for the purpose
23 of delivering waters or drinks to them which have been previously ordered. Denies that by a general or any arrangement plaintiffs keep, said alleged regular customers supplied with said waters or drinks without any specific order being given in advance of each of said visits; denies that said general arrangement is made through standing orders given prior to, or at the time of the beginning of, deliveries to some of said alleged regular customers; denies that at the time of the plaintiffs' said visits to said alleged customers, plaintiffs' said drivers, in accordance with said alleged general arrangement delivers to said customers so much of said waters or drinks as each of them may need; denies that all of said waters or drinks are of the same kind as those called for in said alleged standing orders, or are delivered upon the same terms, in all respects, or for the same prices, or at the same credits, as specified in said alleged standing orders. Denies that the said vehicle of plaintiff carries a sufficient amount of said waters or drinks for the purpose of filling said alleged standing orders under said alleged

general arrangement; denies that in addition to the waters or drinks carried or loaded on the said vehicle, or in the process of transportation, as described in the petition, the plaintiffs, at no time have, or have had, any waters or drinks which were not sold previous to the time of delivery in Kentucky; denies that plaintiffs does not maintain, or never have maintained, an office or other place of business in Kentucky, and does not, or never *has*, manufactured said
24 waters or drinks in said state. Denies that at no time in Kentucky has plaintiff solicited or solicits, any sales of its said waters of drinks, or offers or exposes, or has offered or exposed for sale to the general public, the same, or to any purchaser who will buy them or carries them about for said purposes. Denies that the only exception is that plaintiff does, once in a while, sell a case of said waters or drinks, from its said vehicle to some person asking to purchase same, or once in a while sell same to some person who has been solicited to become, or who has signified that he would or might become a regular customer of said waters or drinks, provided those so sold to him should become satisfactory.

Denies that said waters or drinks are placed in covered or fastened bottles or siphons in Cincinnati, Ohio, or that they are packed in separate or distinct wooden or metal packages or cases; denies that each case or package contains a certain number of bottles, as the nature or form of the particular waters or drinks may require, or according to the custom of plaintiffs, or of those persons who manufacture or sell waters or drinks, or who constitute the trade in general; denies that same are then shipped in plaintiff's said vehicle, or delivered by plaintiff's driver from said vehicle to plaintiff's said alleged customers in Covington, Ky., in the same form or shape as that in which they have been shipped or carried; denies
25 that said package or case continues or remains unbroken in said original form or shape, at all or any time from said point of shipment to said point of delivery; denies that none of said packages or cases are ever sold or delivered, except as an entirety.

Defendant denies that in accordance with the provisions of said ordinance mentioned in the petition the plaintiffs were compelled, before being permitted to carry on the said business in Covington, to take out and pay for or, did take out, and pay for, or, did believe that they were compelled to take out and pay for licenses for carrying on its above described business in Covington, during these years 1910-1911, 1911-1912, 1912-1913, 1913-1914.

Denies that the amounts paid for said licenses by plaintiff or that the times when same were paid, were as follows, namely: May 14, 1910, $150.00; May 4, 1911, $150.00; May 3, 1912, $150.00; May 15, 1913, $150.00; total $600.00.

Denies that the provisions of said ordinance did not, or could not, apply to any business carried on by plaintiff in said city during any of said times, for the reason that plaintiff were not at or during said times, or any part thereof, engaged in business in *in said business in* said city as a wholesale dealer in soft drinks or as a manufacturer of same; denies that said provisions of said ordi-

26 nance, in so far as it was attempted to apply to them, or they were applied to said business of plaintiffs in said city, were invalid or illegal or unconstitutional, or in contravention of article I, section 8, paragraph 3, of the Constitution of the United States of America, in that said business of plaintiffs in said city is, or was, at or during said times, interstate commerce; denies that said provisions as to plaintiffs' said business amounted to, or were, a restraint upon, or regulation of, interstate commerce.

Denies that no part of said sum of $600.00 has ever been repaid to plaintiffs; denies that repayment thereof has been demanded of Defendant.

Paragraph #2. Defendant denies that presumably or at all, after the passage and approval of the ordinance mentioned in the petition the plaintiffs have, in accordance with said provisions of said ordinance, been notified by this defendant that they will be compelled to take out or pay for a license for the year beginning May 1, 1914, before being permitted to carry on its said business in said city during said year; denies that the amount of said license will be $150.00; denies that this Defendant, through its officers or agents, is threatening to, or will, cause or procure, the arrest or prosecution of plaintiffs, their drivers or agents, or threatening to enforce, or will enforce against them, the penalties mentioned or provided for in said ordinance, unless plaintiffs shall comply with the terms thereof, or take out and pay for said license.

27 Denies that said provisions of said ordinance do not, or cannot apply, to any business which is or will be carried on by plaintiffs in said city during said year, for the reason that plaintiffs are not, or will not, at or during said time, or any part thereof, be engaged in business in said city as a wholesale dealer in soft drinks, or a manufacturer of same.

Denies that said provisions of said ordinance, in so far as it is or may be attempted to apply them, to the business of plaintiffs in said city, are invalid, illegal, unconstitutional, or in contravention of article I, section 8, para. 3, of the Constitution of the United States of America, in that said business of said plaintiffs in said city is, and will be, at or during said time, interstate commerce; denies that the business of plaintiffs in the City of Covington, is or will be, at or during said time, interstate commerce; denies that said provisions as to plaintiffs' said business amount to or are, a restraint upon or regulation of, interstate commerce.

Denies that plaintiffs' business will suffer great or irreparable loss or injury in consequence or as a result of the enforcement of said ordinance. Denies plaintiffs will also be required to bring a multiplicity of actions to recover from said city the amounts of said licenses which may be paid by them, denies that plaintiffs have no adequate remedy at law to avoid a multiplicity of such actions, or to prevent the threats or attempts of the defendants, its officers or agents, to arrest or prosecute plaintiffs, their drivers or agents,

28 in the enforcement thereof; or to secure their own rights; denies that the only adequate remedy which they have in the

premises, or to void such multiplicity of actions is an injunction to restrain defendant, its officers and agents, from in any way interfering with, molesting, arresting, or prosecuting plaintiffs, their drivers or agents, while carrying on plaintiffs' said business in said city.

Wherefore, having fully answered, defendant prays to be hence dismissed and for its costs herein.

FREDERICK W. SCHMITZ,
Solicitor for Defendant, City of Covington.

29 *Order Filing Supplemental Petition.*

"Plaintiff filed in open Court Supplemental Petition."

Said Supplemental Petition is as follows:

Supplemental Petition.

"Plaintiffs, by leave of court, for supplemental to their petition herein, repeating and adopting all the allegations contained in said petition, say that, since the filing of said petition, to-wit: On the 30th day of April, 1915, defendant passed and adopted an ordinance amending and re-enacting Section 13 of the ordinance last mentioned and set forth in said petition, entitled "An Ordinance relating to the licensing of certain occupations, professions and trades in the City of Covington, Kentucky": that said ordinance, as amended, contains the following provisions, to-wit:

Section 1.

"That it shall be unlawful for any person to engage in any occupation, profession or trade hereinafter mentioned, without first obtaining a license therefor as hereinafter prescribed."

30 Section 2.

"All persons engaged in carrying on, conducting, or managing in the City of Covington, Kentucky, any business, calling, occupation profession, or trade, hereinafter named, shall apply for a license to be granted by said city to said applicant, and pay therefor the fee hereinafter set out, or set opposite said business, calling, occupation, profession or trade, before said person shall so engage.

Whenever any business, calling, occupation, profession or trade, is covered by both a general term and a specific term named herein, it shall be the duty of any person so engaged, to apply for and pay the license fee required under the specific term named herein."

Section 4.

"All licenses granted herein shall date from the first day of May of each year, and shall be issued for a period of one year, therefrom.

provided, however, that where a rate per diem or for a shorter period than one year is made, said license may be issued for one year or more days at the prescribed rate."

Section 5.

"All licenses granted under the provisions of this ordinance shall expire on the first day of May of each year, subsequent to the issue of said license, and if the same is renewed between the 15th day of May and the first day of June, the said license shall bear a penalty of ten per cent (10%); and if renewed on or after the first day of June, the said license shall bear a penalty of fifteen per cent (15%). Any person taking out a license after the first day of May of each year and paying the penalty above specified shall not be relieved from the liability for the *time* imposed for operating without a license as provided in the ordinance."

31

Section 7.

"Every person granted a license hereunder shall exhibit the same at all times in some conspicuous part of his, her or their place of business, and shall produce the same when applying for a renewal or when requested by any municipal officer, or member of the Police Department of the City of Covington."

Section 8.

"The conviction and punishment of any person for transaction of any business without a license, shall not exempt such person from the payment of any license fee, due or unpaid at the time of said conviction."

Section 11.

"For the purpose of this ordinance the word 'Person' shall be deemed to mean any person or persons, firm, individual or individuals, partnership, company, society, association, or joint stock company."

Section 12.

"Any person who shall violate any of the provisions of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereon, shall be punished in the police Court by a fine of not less than ten ($10) dollars, nor more than fifty ($50) dollars."

Section 13.

"The business, calling, occupation, profession, or trade, license for which is required herein, together with the amount annually, except as otherwise specifically set out, to be charged for same, is as follows:

"Soft drinks, extracts and all other finished and unfinished drinks, other than a liquid usually known as spiritous, vinous, or malt liquors, wholesaler, manufacturer, or firm or person engaged
32 in the sale, thereof in the City of Covington, provided that this shall not apply to sales made by manufacturers, wholesalers, persons or firms, located outside of the state of Kentucky, by way of filling orders previously sent to and received by them at their place of business $150.00."

Section 14.

"All revenue realized hereunder shall go to and be for the benefit of the funds and in the amounts prescribed by the apportionment ordinance passed by the Board of Commissioners, apportioning the revenue for said city for the year in which said licenses are collected."

Section 15.

"This ordinance shall take effect and be in force from and after its passage and due recordance."

Presumably in accordance with said provisions of said ordinance as amended, and since the passage and approval thereof, plaintiffs have been notified by defendant that they will be compelled to take out and pay for a license for the year beginning May 1st, 1915; before being permitted to carry on its said business in said city during said year, the amount of which license will be one hundred and fifty dollars ($150.00), and defendant, through its officers and agents, is threatening to and will cause and procure the arrest and prosecution of plaintiffs, and their drivers and agents and threatening to enforce and will enforce against them the penalties mentioned and provided for in said ordinance, unless plaintiffs shall
33 comply with the terms thereof and take out and pay for said license.

Said provisions of said ordinance do not and cannot apply to any business which is and will be carried on by plaintiffs in said city during said year for the reason that plaintiffs are not and will not at or during said time or any part thereof, be engaged in the business therein mentioned and described.

Said provisions of said ordinance, as amended, in so far as it is or may be attempted to apply them to the business of plaintiffs in said city, are invalid, illegal, unconstitutional and in contravention of article I, Section 8, Paragraph 3, of the Constitution of the United States of America in that said business of plaintiffs in said city is and will be at and during said time interstate commerce, and said provisions, as to plaintiff's said business, amount to and are a restraint upon and regulation of interstate commerce.

3. If said ordinance, as amended, shall be enforced against plaintiffs for the year beginning May 1st, 1915, on the same basis in after years, plaintiffs will be compelled to pay to said city the sum of one hundred and fifty dollars ($150.00) for a license to carry on its said

business therein each year, or plaintiffs will not be permitted to carry on *its* said business therein, and said business, which is very valuable, will suffer great and irreparable loss and injury in consequence and as a result of the enforcement of said ordinance. Plaintiffs will also be required to bring a multiplicity of actions to recover
34 from said city the amounts of said licenses which may be paid by them. Plaintiffs have no adequate remedy at law to avoid a multiplicity of such actions, or to prevent the enforcement of said ordinance, or to prevent the threats and attempts of the defendant, and its officers and agents, to arrest and prosecute plaintiffs and their drivers and agents in the enforcement thereof, or to secure their own rights; and the only adequate remedy which they have in the premises, and to avoid such multiplicity of actions, is an injunction to restrain defendant and its officers and agents from enforcing said ordinances, and to restrain defendant, its offifers and agents from in any way interfering with, molesting, arresting or prosecuting plaintiffs and their drivers and agents while carrying on plaintiff's said business in said city.

No injunction to restrain the acts of defendant complained of in this petition, nor to restrain defendant from the enforcement of said ordinance as amended or from arresting, prosecuting, molesting or interfering with plaintiffs and their drivers and agents, while carrying on plaintiff's said business, has ever been refused by this Court nor by any Court nor by any Circuit Judge nor by any Judge.

Wherefore, inasmuch as plaintiffs are without any adequate remedy in the premises, except in a Court of Equity, they pray that the said provisions of said last mentioned ordinance as amended
35 may, for the reasons herein stated, be held null and void and of no effect in so far as they, or any of them, relate to the said business carried on by plaintiffs in said city of Covington; and plaintiffs pray that said City and its officers and agents may be restrsined and enjoined from enforcing the said provisions of said ordinance in so far as they relate to their said business and from interfering with, molesting, arresting or prosecuting them, their drivers and agents while carrying on same; and plaintiffs pray that a temporary injunction may be granted restraining said city, its officers and agents, from arresting, prosecuting, molesting or interfering with them, their drivers and agents, while carrying on said business; and plaintiffs further pray that, on the final hearing of this cause, such injunction be made perpetual; and that they may have such other general and special equitable relief as the nature of their case may demand, and as prayed for in his original petition.

MACKOY & MACKOY,
Attorneys for Plaintiffs.

STATE OF KENTUCKY,
County of Kenton, ss:

H. B. Mackoy, being first duly sworn, says that — is one
36 of the attorneys for plaintiff named in the foregoing supplemental petition; that said plaintiffs are non-residents of and

now absent from this county and state and have no officer or managing agent in this state upon service of summons might or could be had, if they were defendants herein; affiant further says that the statements contained in the foregoing pleading are true.

H. B. MACKOY.

Subscribed and sworn to before me and in my presence this 17th day of May, 1915.

——— ———.

37 At a sitting of said Court on September 20, 1915:

"The Parties filed in the Clerk's office, Agreed statement of facts, and agreed order submitting case for final judgment."

Said Agreed Statement of Facts, and agreed order are as follows:

"The parties hereto state that the controversy between them, hereinafter set out, is real and these proceedings are entered upon in good faith to determine their respective rights.

Agreed Statement of Facts.

The agreed facts are as follows, to-wit:

1st. Plaintiff's business consists, and for more than five years prior to filing their petition herein has consisted, of manufacturing and bottling of certain drinks, viz: vichy, lithia, sodium phosphate, selt-ers, gingerale, club soda and similar distilled and artificial mineral and medicinal waters, commonly known as "soft drinks," which they sell and deliver by their own vehicle. Defendant, the

38 City of Covington, is a municipal corporation of the second class, under the laws of Kentucky. Plaintiff's factory and bottling works are in the city of Cincinnati, State of Ohio.

2nd. Plaintiff's business in Covington is and has been during said period carried on in the following manner, viz:

Their vehicle makes two or three visits a week to the retail dealers in said city, whose names are on their list, for the purpose of ascertaining what amounts of "soft drinks" each of them may need or desire to purchase of plaintiffs. A very large proportion of said dealers are and for a number of years have been on plaintiff's list and have purchased plaintiff's goods during said time under a general understanding that plaintiff's vehicle would call on said visits and furnish them with such drinks as they might need or desire to purchase of plaintiffs. The remaining portion of names on said list *have* been acquired from time to time by plaintiffs who solicit and obtain new customers of the same kind in Covington, with whom the arrangement and understanding are had. Prior to February 8, 1914, said additions to said list of customers were obtained by solicitation of plaintiff's drivers, but since said date they have been obtained by the solicitation of a special agent or "drummer" who gives such new names to the drivers and thereafter said new customers are served as above stated.

39 The original or larger proportion of plaintiffs' list of customers, hereinabove referred to, was obtained more than five

years ago, when plaintiff first began the manufacture and sale of soft drinks, in the following manner; there was made up from city directories and other information, a list of retailers of soft drinks, and thereupon the drivers and agents of plaintiffs called upon said retailers for the purpose of getting acquainted with the trade, and informing said retailers that plaintiff's said drivers would thereafter make regular visits, carrying with him a supply of plaintiff's goods, and would be prepared to sell to them if they desired to purchase and pursuant to such understanding the visits hereinabove mentioned were thereafter regularly made by plaintiff's driver and agent.

When a customer's place of business is reached by the vehicle, said driver goes into the store-room and either asks or looks to see what amount of drinks is needed or wanted. He then goes out to the vehicle and brings from it the necessary amount, which he carries into the store and delivers to the customer. The vehicle has previously been loaded at the factory and bottling works of plaintiffs, which are located in the city of Cincinnati, Ohio, where all said drinks are manufactured and bottled.

Said retail dealers are not bound in any way to the purchase of any amount of said waters when the aforesaid calls are made
40 upon them by said drivers of plaintiffs.

Said drinks are in fastened or stopped bottles or siphons, according to their nature. These bottles or siphons are placed at the bottling works in Cincinnati, Ohio, in separate, distinct wooden or metal cases, each case being open at the top and holding a certain number of siphons or bottles, as the nature and kind of the drinks may require and according to the custom of plaintiffs and of those persons who manufacture or deal in said drinks and who constitute the trade. Said cases and the other bottles or siphons therein are of the same kind, form and size as those which are and have for a long time past been used by producers and shippers of such goods in transporting same in the ordinary course of business between manufacturers and dealers in Cincinnati, and the trade in Covington. Said drinks in said bottles or siphons are carried on said vehicle in said cases and sold and delivered in them, each case remaining entire and unbroken from point to point of delivery. Nothing less than a case is ever sold or delivered, and the contents of said cases are not mixed or changed from the way they are put up in Cincinnati.

Said vehicle of plaintiffs on its trips to Covington always carries sufficient drinks, shipped and packed as above described, to meet the probable demands of the customers mentioned, based on past experience, but with the exception of the drinks on loaded vehicles, plaintiffs at no time have any drinks in the State of Kentucky,
41 and do not keep nor have ever kept ther-in any factory, bottling works, warehouse, store-room, office or place of business, nor have they ever manufactured any drinks in said State.

3rd. With the exception of *a*ccasional small amounts carried upon said wagons for delivery, in response to orders previously received at the place of business of plaintiffs in Cincinnati, through mail, telephone, or other verbal message, all sales of plaintiffs made in the city of Covington are brought about in the manner set out in item 2.

Under the manner in which plaintiffs' business is conducted in Covington, plaintiffs' agents or drivers may visit or call upon said trade, or list of retail dealers, likely to make purchases, and may on such trips, succeed in selling the entire supply then and there carried upon their wagons, or merely a part ther-of, or may return after having made but few, or no, sales at all, in which event they carry said unsold supply back to plaintiffs' place of business in Cincinnati.

4th. Said retail dealers usually pay cash, and simply purchase the waters contained in said bottles, but the bottles and cases, excepting as hereinafter mentioned, always remain the property of plaintiffs, and are subsequently collected by plaintiff's drivers or agents on said regular calls ,or visits if found empty. There are a few customers who pay for and thereafter own the bottle in which distilled water is delivered.

42 5th. The aforesaid retail dealers are usually being furnished with similar mineral waters or soft drinks by other manufacturers in the cities of Cincinnati and Covington, while also dealing with plaintiffs; they purchase said waters from one or *to* the other of said manufacturers upon the visits of the respective agents or drivers, according to their needs, or, according to their mood, for the time being.

6th. On April 30, 1910, Defendant passed, adopted and approved an ordinance, the pertinent provisions of which are fully set forth in the petition herein, whereby a license fee of one hundred and fifty ($150.00) per annum was imposed upon wholesale dealers in soft drinks and manufacturers of same doing business in the city of Covington. In accordance with the provisions of said ordinance, which were in full force and effect during the year hereinafter mentioned, and before being permitted to carry on their said business in said city, plaintiffs were compelled by defendant to take out and pay for, and being so compelled and both plaintiffs and defendant believing that plaintiffs were compelled to pay same, did take out and pay for licenses for carrying on their above described business in said city during the years 1910-1911, 1911-1912, 1912-1913, 1913-1914.

7th. The Plaintiffs with the exception of the license fee imposed by the City of Covington, for the years 1914 and 1915, have regularly paid to the city of Covington the license fee set out in the

43 petition herein, to-wit:

May 14, 1910	$150.00
May 3, 1911	$150.00
May 4, 1912	$150.00
May 15, 1913	$150.00

without protest, and no refunder has ever been demanded of the city of Covington, excepting through this action.

8th. On April 30, 1914, defendant passed, adopted and approved an ordinance, the pertinent provisions of which are fully set forth in the original petition herein, whereby a license fee of one hundred and fifty ($150.00) Dollars per annum was imposed upon manufacturers and wholesalers of soft drinks doing business in the city of

Covington. In accordance with the provisions of said ordinance, which were in full force and effect at the time the petition was filed and restraining order and temporary injunction granted herein, plaintiffs had been notified by defendant that they would be compelled to take out and pay $150.00 for a license for the year beginning May 1, 1914, before being permitted to carry on their said business in said city, and defendant, through its officers and agents, was threatening to and would cause and procure the arrest and prosecution of plaintiffs and their drivers and agents, and was threatening to and would enforce against them the penalties mentioned and provided for in said ordinance, unless plaintiffs should comply
44 with the terms thereof and take out and pay for said license.

9th. On April 30, 1915, defendant passed, adopted and approved an ordinance, the pertinent provisions of which are fully set forth in the supplemental petition filed herein May 17, 1915, whereby a license fee of one hundred and fifty dollars, ($150.00) per annum is imposed upon all wholesalers, manufacturers or firms or persons engaged in the sale of soft drinks, extracts and all other finished and unfinished drinks other than liquors usually known as spiritous, vinous or malt liquors, in the city of Covington, but said ordinance contained the following provisions:

"Provided, that this shall not apply to sales made by manufacturers, wholesalers, persons or firms located outside of the State of Kentucky, by way of filling orders previously sent to and received by them at their place of business."

In accordance with the provisions of said ordinance which are now in full force and effect, plaintiffs have been notified by defendant they will be compelled to take out and pay one hundred and fifty dollars, ($150.00) for a license for the year beginning May 1, 1915, before being permitted to carry on their said business in said city, and defendant, through its officers and agents, is threatening to and will cause and procure the arrest and prosecution of plaintiffs, their drivers, and agents, and is threatening to and will enforce against them the penalties mentioned and provided for in
45 said ordinance, unless plaintiffs shall comply with the terms thereof and take out and pay for said license.

10th: Plaintiffs have a valuable business in the City of Covington, which will suffer great loss and injury, if they are not permitted to carry on their said business therein. Plaintiffs will also be required to bring a multiplicity of actions to recover said license fees if paid, and plaintiffs have no adequate remedy at law to protect or enforce their rights herein.

11th: No injunction to restrain the acts of defendants complained of or to restrain it in the enforcement of said ordinance, or from arresting, prosecuting, molesting, or interfering with plaintiffs and their agents and drivers, while carrying on said business in Covington, has ever been refused by this Court, or by any Court, or by and Circuit Judge or by any Judge."

MACKOY & MACKOY,
Attys. for Plaintiffs.
F. W. SCHMITZ,
City Solicitor.

Agreed Order.

"It is agreed by and between the parties hereto that this cause shall now stand submitted for final judgment upon the Agreed Statement of Facts filed herein."

MACKOY & MACKOY,
Attys. for Plaintiffs.
F. W. SCHMITZ,
City Solicitor.

46 At a sitting of said Court *in* May 15, 1916:

Order Filing Opinion—Judgment.

"The court files an opinion. This cause having been submitted for judgment upon an agreed state of facts contained in the record, it is adjudged that the Plaintiff's petition be dismissed and that the defendant recover of the Plaintiff its costs herein, to which the Plaintiff excepts."

At a sitting of said Court *in* May 29, 1916:

Order Filing Motion to Vacate Decision and Grant a New Trial.

"The Plaintiffs filed in the Clerk's office motion to vacate the decision and to grant a new trial."

Said Motion is as follows:

Motion.

"Plaintiffs now come and move the Court to vacate its decision and to grant a new trial herein on the following grounds, to-wit:

1. Because said decision is not sustained by the evidence in that the agreed statement of facts shows that the business which plaintiffs are and have been carrying on in the City of Covington is interstate commerce, which is not subject to regulation *of* control by the City of Covington.

2. Because said decision is contrary to law, in that the Supreme Court of the United States has adjudged and determined in similar cases that business similar to the business which plaintiffs are and have been carrying on in the City of Covington, are interstate commerce; and that, under the opinions of said Court, the busi-

47 ness of plaintiffs in the City of Covington must be and is regarded as interstate commerce, which is not subject to regulation or control by the City of Covington.

MACKOY & MACKOY,
Attorneys for Plaintiff.

Contra:
F. W. SCHMITZ,
Attorney for Defendant.

At a sitting of said Court on June 5, 1916:

Order Overruling Motion for a New Trial, Exception and, Appeal to the C. of A.

"The Plaintiff's motion and grounds for a new trial is overruled, Plaintiff excepts and prays an appeal to the Court of Appeals, which is granted."

48 Be it remembered that on the 12th day of October 1917, there was entered in the Court of Appeals of Kentucky, an Order to-wit:—

Eagle Bottling Works, Appellant vs. City of Covington, Appellee; Cincinnati Soda Water & Ginger Ale Company vs. City of Covington; and Wm. T. Wagner vs. City of Covington. The Appellant's motion *with* the above styled cases to be heard together is sustained, and it is therefore ordered that the above cases be consolidated and heard together.

49 Be it remembered that on October 26, 1917, the Court entered thefollowing judgments herein.

Eagle Bottling Works, Appellants, vs. City of Covington, Appellee; Cincinnati Soda Water & Ginger Ale Company vs. City of Covington, and Wm. T. Wagner vs. City of Covington.

The Court being sufficiently advised, it seems to them there are no errors in the judgments herein. It is therefore ordered that each of said judgments be affirmed, and that the Appellee recover of the Appellants its costs herein expended which is ordered certified to the clerk of the lower court.

The Court delivered the following opinion upon the above judgments:

50 Court of Appeals of Kentucky, October 26, 1917.

No. 149.

WILLIAM T. WAGNER et al., Appellants,

vs.

CITY OF COVINGTON, Appellee.

No. 148.

A. C. GILLIGAN, Doing Business under the Name of the Eagle Bottling Works, Appellants,

vs.

CITY OF COVINGTON, Appellee.

No. 147.

THE CINCINNATI SODA WATER & GINGER ALE COMPANY, Appellants,

vs.

CITY OF COVINGTON, Appellee.

Appeal from Kenton Circuit Court, Common-law & Equity Division.

Opinion of the Court by Judge Sampson, Affirming.

The three foregoing styled causes were instituted in the Kenton Circuit Court to recover of the City of Covington certain sums
51 paid as licenses tax to the City by the complainants, and seeking an injunction restraining the city and its officials from interferring with the complainants or arresting their drivers and agents while engaged in the conduct of their business in the City of Covington.

An agreed state of facts is filed and made a part of the record in each case. From this we learn that the Appellants each have and conduct a bottling works in Cincinnati, State of Ohio, in *and* which they manufacture, bottle and pack various soft drinks which they market by wholesale; that some of their goods are sold in the City of Covington, state of Kentucky, but that Appellants have no warehouse or other place of business in Covington, and that all sales were by wholesale and delivered in original packages. As Cincinnati and Covington are divided only by the Ohio River and the imaginary state line, the goods intended for sale in Covington are loaded on board vehicles in Cincinnati and carried across the river to Covington for delivery. Some of the goods are sold on orders received in Cincinnati from customers in Covington. These orders are

52 sometimes transmitted by mail, and sometimes by telephone, and other times by agent. The Appellants have been engaged in the wholesale bottling business for several years past, and have built up a business in the city of Covington, and have established a trade here among regular customers, occasionally, however, a new customer is added, or a package of goods is sold to a prospective customer, or to some one applying for such package to the driver of the wagon after the goods have been carried into Kentucky. Most of the goods, however, are carried into Kentucky without an order from a customer.

The City of Covington, through its legislative body, passed an ordinance entitled "An ordinance fixing and imposing licenses upon certain occupations, professions, and trades, prescribing the manner of the issuing of said licenses, and apportioning the revenue realized therefrom," by which ordinance it is provided that manufacturers and wholesale dealers in soft drinks shall pay a license tax of One Hundred Fifty ($150) Dollars for the privilege of carrying on their business in the city of Covington. Under this ordinance
53 appellants have for several years back, under protest, paid said license tax of One Hundred fifty ($150) Dollars, per year, and these actions were instituted to recover the sums thus paid and to restrain the City and its officials from requiring future payments, or interferring with said officials, it being the contention that appellants are engaged in Interstate commerce, and the transactions recited in the agreed state of facts constitute commerce between citizens of different states, and that the ordinance in question is a restraint upon and interference with such damages, and, therefore, violative of Article 1, Chapter 8, Paragraph 3, of the Federal Constitution. If the transactions referred to constitute interstate commerce, then it would follow that Appellants were not subject to such licenses, and are entitled to the relief sought.

It is insisted that the goods which appellants sell in Kentucky have never up to the time of sale become identified with, part of, or commingled with the general mass of property in the state; but, being shipped, sold and delivered in original packages, must
54 be regarded as being a part of interstate commerce until sold and delivered, and up to that time are not subject to State regulation or control. It is further asserted that the goods of appellants, being in interstate commerce and having never acquired a situs, or come to rest in Kentucky are not subject to a tax by the City of Covington either by way of an advalorem or occupation license tax; and plaintiffs themselves being engaged in interstate commerce and being non-residents who have no office, warehouse or other place of business in said City, can not be subject to either of said taxes.

By the agreed state of facts, it is shown that Appellants, through their agents, load vehicles in Cincinnati, with the goods in question, and these goods are carried by such vehicles across the river into Kentucky without orders from such prospective purchasers first having been transmitted to Appellants in Cincinnati. The drivers of the vehicles are solicitors and take and fill orders from these wagons.

They drive up to the place of a customer and ascertain, by
55 inquiry or otherwise, whether he desires to purchase goods; if he does, then a package, or packages, are delivered, according to his wishes and direction, at an agreed price. The whole negotiation *are* then and there conducted and concluded. It is wholly made in the City of Covington, and state of Kentucky. In substance this is what takes place: The driver asks the customer, "Do you want to buy my goods?" And the customer answers, "What is your price?" And the driver responds, giving the figures. The customer says, "I will take the goods; You may deliver the packages." Thereupon the driver unloads the goods and places them in the house of the customer. All these words may not be spoken, but the words and acts together amount to as much.

The ordinances are not assailed, but Appellants contend that they being engaged in interstate commerce do not come within the purview thereof. In the case of the City of Newport v. Wagner, 168 Ky., 641, where the facts are almost identical with those under consideration in these cases, this court held:

56 "Contracts for the sale of goods made by a citizen of one state with a citizen of another, through the medium of the mails or by telephone, and which are delivered by the seller to the purchaser in "original packages" by means of vehicles, it seems would be protected from taxation by the authorities of the state to which they are transported, while in the "original packages," and in the hands of the seller. Goods delivered to a common carrier at a point without the state, consigned to a purchaser at his residence within the state, are exempt from state regulations, during the course of transportation. * * * A state has no power over goods shipped from one state to another for sale in interstate commerce, until the one receiving the goods has so acted upon them, that they have become incorporated and mixed with the mass of property in the state, which happens when the original package is no longer such in his hands. * * * In the case at bar some of the transactions were, without doubt, such transactions in interstate commerce as would not render the appellees liable for the license tax, which was imposed upon a wholesale dealer in Newport by the ordinance, but the transactions, when appellees, without having received any order for the shipment of goods from their place of business in Cincinnati, and without any contract for their delivery, brought the goods into Kentucky and into Newport, and there exposed them for sale, and sold and delivered them, these were transactions in Kentucky, the contract, sale and delivery. The mere fact that appellees contemplated that some one, who had previously purchased goods, would purchase the goods when they should be exposed for sale, in Newport, could not be construed into a negotiation between citizens of different states, for the sale of goods then in one state to be delivered in another; neither was there any contract of sale of such goods, except in Kentucky. So far as the sales made in Kentucky were concerned, when made after the goods were brought into Newport, and without any previous negotiations

for the purchase of the goods by the persons by whom they were purchased and to whom they were delivered in Newport, the appellees were simply doing business as wholesale dealers in soft drinks, wholly within the city of Newport, although the goods had their origin in Ohio."

To the same effect is the case of the City of Newport v. French Bros. Bauer Co., 169 Ky., 174. In that case a similar license ordinance was under consideration, the City of Newport having
57 required French Bros. Bauer Co., to take out and pay for a license permitting them to carry on the business of selling milk, butter, and other supplies. In refusing the relief sought this court said: "The butter business license and the milk venders' license were taxes imposed upon the privilege of dealing in butter and selling milk, respectively, in Newport. They were not direct taxes upon either the butter or milk. These taxes were laid upon the business of all persons who engaged in either of the occupations in Newport, irrespective of where the persons resided who engaged in the occupations whence the goods, which were sold, originally came. No discrimination is made by the ordinance in favor of the citizen or products of any state in favor of those of another. When the goods of appellee were brought into Newport and there exposed for sale, without any previous contract or orders made for them, by citizens of Newport, while the goods were in Ohio, and were contracted for, sold and delivered in Newport, it was a business conducted entirely in Kentucky. * * * A state is authorized to lay a tax upon any business which is carried on wholly within the state, as a tax upon an occupation, if such tax is not levied in such a way as to discriminate against the persons who are citizens of another state or the products of another state, and the lay-
58 ing of such a tax, without any discrimination, is not a regulation of or restraint upon interstate commerce, although it may incidentally affect it."

All that was said in the case of the City of Newport against Wagner, and in the case of the City of Newport against French Bros. Bauer Co, supra, is equally true in the three cases under consideration. Every question raised upon these appeals were discussed and disposed of by this Court in the opinions referred to.

The moment the driver halts his vehicle in front of a retail dealer's place of business for the purpose of negotiating a sale, and there exposes his goods for sale, the goods obtain a situs, and are subject to the laws and taxing power of the Commonwealth. It does not matter that the goods are sent into Kentucky with instructions to the drivers to return those not sold, if any part remains unsold, after visiting all of the former customers, to the factory in Ohio. Neither does it matter that a part of the goods make an entire circuit on some occasions. The test seems to be the passing of negotiations between the manufacturer in one state on the one hand, and
59 the prospective purchaser in a different state on the other.

If a dealer in Covington, Kentucky, should by telephone, call up one of appellants in Cincinnati, Ohio, and say: "Please send

me a case of your goods by your wagon today." There could be no doubt the transaction was one in interstate Commerce, when the goods were delivered in the original package. But where without such order, or any order, and upon the mere expectation of finding a purchaser, goods are sent across the state line with the hope of finding a purchaser and delivering the goods, the acts which constitute the sale of the goods are entirely within Kentucky. No part of it takes place in the state of Ohio. The purpose of the provision of the Federal Constitution called the "Commerce Clause," and the acts of our congress thereunder, are not to give an advantage to a citizen of a foreign state over a resident in the matter of Commerce, but to prevent the states from legislating against goods which are manufactured in a foreign state and from discriminating against the citizens of another state in its trading and commerce. In other words, it is intended that trade and commerce shall be free and untrammeled among the citizens of the several states.

60 There is no sanctity in the "original package" and no protection afforded it, unless such original package be moving in interstate commerce. After goods, which have their origin in a foreign state obtain a situs in this Commonwealth, they are subject to the law and the taxing power in the same manner as other property of like kind in the State, notwithstanding the imported goods may continue in the original packages. This, concisely, is the position of appellants' original packages brought into the state and exposed and offered for sale.

The license tax charge against Appellants is not unreasonable and it is not sought to declare the ordinance unconstitutional or void, except in so far as it affects appellants and interstate commerce. Since it does not place a restraint upon interstate commerce, and the transactions referred to in appellants' petitions do not amount to interstate commerce, the judgments of the lower court dismissing appellants' three actions must be sustained.

Judgment affirmed.

Harry Brent Mackoy, Cincinnati, O.
Mackoy & Mackoy, "
For *Appellee*.
Frederick W. Schmitz, Covington, Ky., for Appellee.
H. A.

[Endorsed:] 10/26/17. Wagner vs. City of Cov.

61 Be it remembered that on November 26, 1917, the Court of Appeals of Kentucky, entered the following orders, to-wit:

Court of Appeals of Kentucky.

WILLIAM T. WAGNER et al., Appellants,

vs.

CITY OF COVINGTON, Appellee.

A. C. GILLIGAN, Doing Business under the Name of the Eagle Bottling Works, Appellant,

vs.

CITY OF COVINGTON, Appellee.

THE CINCINNATI SODA WATER AND GINGER ALE COMPANY, Appellant,

vs.

CITY OF COVINGTON, Appellee.

Appeals from Kenton Circuit Court, Common-law and Equity Division.

Petition for Rehearing.

Came Appellants by counsel and filed herein, written petition for re-hearing and moved the Court to grant same; which motion is submitted.

The petition for rehearing referred to in the foregoing order is in words and figures as follows, to-wit:

62 The opinion of this Court contains the following statement:

"The moment the driver halts his vehicle in front of a retail dealer's place of business for the purpose of negotiating a sale, and there exposes his goods for sale, the goods obtain a situs, and are subject to the law and taxing powers of this Commonwealth."

Upon the foregoing theory of the above cases, the court evidently bases its conclusion that appellants are liable to pay a license tax for the privilege of selling such goods.

While we have the greatest respect for the opinion of this Court, we believe that its decision is not in accord with its previous rulings, is not supported by the agreed statements of facts, and is clearly contradictory to the opinions of the Supreme Court of the United States. Moreover, the Court has evidently confused the power of a state to tax property employed or used in its business, or transported in its business, with the power to tax the right to carry on that

63 business. It is the last-mentioned tax only which is being imposed in these cases, and which we contend is a direct burden upon interstate commerce.

Admitting for the sake of argument, that the exposure of appellants' goods for sale in Newport takes place as the Court says, we do not see how such exposure can give them a situs here, or that, they, under the circumstances of these cases, acquire such situs unless they are sold. It is the last-mentioned act which must fix the situs and not the exposure, because, when not sold, they are carried back to Ohio on the same trip of the same wagon. If the mere exposure for sale has such an effect, why has the Supreme Court of the United States held that goods in original packages are not mingled with the mass of property until after a sale takes place. Moreover, if personal property can be taxed at one hour of the day in Ohio, the next hour in Kentucky while being offered for sale by the importer and the third hour of the same day either in the hands of the retail dealer in Kentucky, or in the hands of the importer again in Ohio, when not sold, it results in a peculiar situation. It is certainly a sure and
64 swift method of deriving different revenues from the same personal property.

In previous cases this Court has laid down the rule that:

"The situs of tangible personal property for purposes of taxation is in the state in which it is permanently located." (Emphasis ours.)

This was the doctrine of Commonwealth v. Haggin, 30 K. L. R. 788, 790, where other Kentucky cases are cited as well as the decision of the Supreme Court in Union Transit Co. v. Kentucky, 149 U. S., 194. The Haggin case has been followed and approved in a number of later decisions, including Commonwealth v. Prudential Life Ins. Co., 149 Ky., 380, 383, etc., where the later Kentucky authorities, as well as the Supreme Court decisions are fully and ably reviewed by Judge Miller. See also, Commonwealth v. Union Refrigerator Transit Co., 118 Ky., 131, where the Court on page 137 said:

"And whatever may be said as to the judicial utterances of other jurisdictions, our court has uniformly held that, for the purpose of taxation, the situs of personal property of every description is the domicile of the owner."

65 Unless the Legislature has fixed the situs differently and given the state the right to tax such property when temporarily in Kentucky, which has not been done (and it is doubtful whether it can be done), the situs must remain with the owner's domicile. The collection of a tax by the City of Covington under such circumstances is a violation of the Bill of Rights of Kentucky and of the Fourteenth Amendment to the Constitution of the United States.

Bill of Rights of Kentucky, Sections 1 and 2. Fourteenth Amendment to Constitution of the United States.
Scott v. McNeal, 154 U. S. 34, 45.
Cooley on Taxation, 3rd Ed. page 62, notes.
Railroad Tax Cases, 13 Fed. 722.
Cooley's Const. Limitations, 7th Ed. pages 744-747.

The above rule that personalty to be taxed by a state must have a permanent situs in the State, has been recognized by the Supreme

Court of the United States in Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, and in Pickard v. Pullman Southern Car Co., 117 U. S. 34.

66 The power to tax the property of appellants, however, if it exists on the part of the city of Newport, is not the same as the power to tax the right to carry on its business in Newport.

The first-mentioned is an ad valorem tax because property must be taxed according to its value, and the license fee here involved is an arbitrary charge. It might be made large enough to practically stop the business of plaintiffs in that city.

This distinction was noted in Pickard v. Pullman Southern Car Co. supra, at pages 43-44 of the opinion, and has frequently been drawn in other decisions by the Supreme Court. It is stated in the following language of that Court in Pullman's Palace Car Co. v. Com. of Penna., 141 U. S., 18, at page 25:

"Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State can not be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits.

67 But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran v. New Orleans, 112 U. S. 69, 74 (28, 653, 655); Pickard v. Pullman S. Co. 117 U. S., 34, 43 (29, 785, 788); Robbins v. Shelby County Tax Dist., 120 U. S. 489, 497 (30: 694, 697); Leloup v. Port of Mobile, 127 U. S. 640, 644 (32: 311, 313)." (Emphasis ours.)

It will be observed from the above quotation that the Supreme Court holds that a tax on the property employed in a business is an indirect burden, whereas a tax upon the right to carry on the business, as here, is a direct burden on interstate commerce.

To the same effect is the later case of Fargo v. Hart, 193 U. S. 490, where the Court on page 499 said:

"The general principles to be applied are settled. A state can not tax the privilege of carrying on commerce among the states.

68 Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although, belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value

due to what we have called the organic relation of the prop-
69 erty in the state to the whole system. Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 21, 22, 41, L. Ed. 49, 57, 16 Sup. Ct. Rep. 1054." (Emphasis Ours.)

In conclusion we call attention to an extract from the lately published Encyclopedia of United States Supreme Court Reports, Vo. 7, pages 298-300, which summarizes the law on the foregoing subject so ably and clearly that we regard it as covering all of the points made in this petition for rehearing. Being supported by references to numerous cases in the notes, we ask the Court to carefully consider it. The author says:

"Where goods are transported from one state to another or from a foreign country into the United States interstate or foreign commerce in such goods is not completely terminated, and they are protected by the commerce clause until after their sale at the point of designation in the original packages, in the absence of congressional legislation permitting state laws to attach prior to such sale.
70 The right to import lawful articles of commerce from foreign countries into the United States or from one state into another free from state interference or regulation, includes, by necessary implication, the right of the importer to sell the goods imported in the original and unbroken packages at the place where the importation terminates, although to do so may be contrary to state laws. The very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. As a state can not prevent the importation of a lawful article of commerce or prohibit its sale by the importer in the original package in which it was imported, so it can not impose any conditions upon the right to sell, as for example by requiring a license to be taken out to sell imported goods while remaining in the original packages. However, it has been held that when goods transported from one state into another arrive at their destination or come
71 to rest in the latter state, they may be taxed by the state, if taxed like other property situated in the state is taxed, even while remaining in the original packages and unsold. The importer may sell the original packages personally or he may employ an agent to sell them for him. The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sell in the original packages." (Emphasis ours.)

We submit that the present case is governed by the rules enunciated above, and that this Court should reconsider its opinion holding that appellants can be compelled to take out licenses for the privilege of selling their goods in original packages in the City of Covington.

HARRY BRENT MACKOY,
Attorney for Appellants.

MACKOY & MACKOY,
Of Counsel.

72 Be it remembered that on December 1, 1917, the Court of Appeals of Kentucky, entered the following order to-wit:

Eagle Bottling Works, Appellants, vs. City of Covington, Appellee, Cincinnati Soda Water & Ginger Ale Company vs. City of Covington, and Wm. T. Wagner vs. City of Covington.

The Court being sufficiently advised, it is ordered that petition for re-hearing be, and is hereby overruled.

73 Be it remembered that heretofore to-wit, on January 24, 1918, there was filed in the office of the Clerk of the Court of Appeals, Petition for Writ of Error; Assignment of Error; Bond; Order allowing Writ of Error; Writ of Error; Citation and Præcipe, which are in words and figures as follows, to-wit:

74 The Court of Appeals of the Commonwealth of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER, and SOPHIE WAGNER, Partners Doing Business under the Firm Name of W. T. Wagner's Sons, Appellants,

v.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Appellee.

Petition for Writ of Error.

To the Honorable Warner E. Settle, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Now comes William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, the above-named appellants, and represent that they are citizens and residents of the United States of America; that in the above-entitled cause on the 26th day of October, 1917, a final judgment was
75 rendered and entered against your petitioners by the Court of Appeals of the Commonwealth of Kentucky, and petition for rehearing was overruled by said Court on December 21st, 1917, that being the highest court of law or equity in said Commonwealth, affirming the judgment entered by the Common Law and Equity Division of the Circuit Court of the County of Kenton, Commonwealth of Kentucky, in an action wherein your petitioners were plaintiffs and the appellee above-mentioned was defendant, and awarding costs against your petitioners.

Your petitioners say that in the said action they sought to recover of the said City of Covington certain license fees which they had paid to said city under and pursuant to certain ordinances passed and adopted by it April 30th, 1910, and April 30th, 1914, being Nos. 2896 and 94, respectively, of the ordinances of said city, which

ordinances fixed and imposed licenses upon certain occupations, professions and trades in said city and prescribed the manner of issuing such licenses and of apportioning the revenue realized therefrom; and sought to enjoin the enforcement as to your petitioners by said city of the provisions of said last-mentioned ordinance; that the grounds as to each and every of said causes of action were stated to be that the business which your petitioners were at the times mentioned in its petition engaged in and carrying on in said city was interstate commerce and that the provisions of said ordinance,
76 as to your petitioners' business in said city, amounted to and were a regulation of and restraint upon interstate commerce; and your petitioners in their petition expressly alleged and charged the facts aforesaid and further alleged and charged that the provisions of said ordinances and each of them were unconstitutional as to the said business being done by your petitioners in said city in that they violated and contravened Paragraph 3, of Section 8 of Article 1, of the Federal Constitution, giving to Congress the exclusive right to regulate commerce among the several states.

Your petitioners say that it was adjudged by the said Court of Appeals, by its said final judgment in the above-entitled cause, that the business which your petitioners were at the times mentioned in their petition engaged in and carrying on in said City of Covington, Kentucky, was not interstate commerce, and that the provisions of the above-mentioned ordinances and each of them, did not amount to a regulation of or restraint upon interstate commerce and were not in violation or contravention of the provisions of said Pragraph 3 of Section 8 of Article 1, of the Federal Constitution as to the said business being done by your petitioners in said city, all of which appears in the record, opinion and final judgment of said Court of Appeals, affirming the judgment of said Circuit Court and dismissing
77 your petitioners' action, whereby manifest error was committed to the great prejudice and damage of your petitioners.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of the Commonwealth of Kentucky and the judges thereof, to the end that a transcript of the record, proceedings and papers in this cause, duly authenticated as required by law, may be transmitted to the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected and said judgment reversed; and they further pray that the bond herewith presented be approved and that a citation be granted and signed, as provided by law.

W. T. WAGNER,
EDWARD WAGNER &
SOPHIE WAGNER,
Partners as W. T. Wagner's Sons, Petitioners,
By WILLIAM H. MACKOY AND
HARRY BRENT MACKOY,
Their Attorneys.

Endorsed: Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

78 The Court of Appeals of the Commonwealth of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER, and SOPHIE WAGNER, Partners Doing Business under the Firm Name of W. T. Wagner's Sons, Plaintiffs in Error (Appellant-),

v.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Defendant in Error (Appellee).

Assignment of Errors on Petition for Writ of Error.

Now come William T. Wagner, Edward and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, petitioners and plaintiffs in error herein, and by William H.
79 Mackoy and Harry Brent Mackoy, their attorneys, and in connection with their petition in error, say that, in the record and proceedings and in the rendering and entering of the opinion and final judgment in the above-entitled cause, in the Court of Appeals of the Commonwealth of Kentucky, manifest error has occurred to the prejudice of these petitioners and plaintiffs in error, and they make the following assignment of errors, which they aver exist, viz:

First. The court erred in holding that the business which your petitioners and plaintiffs in error were engaged in and carrying on in the City of Covington, Kentucky, at the times mentioned in the petition filed in said record and proceedings was not interstate commerce.

Second. The court erred in holding that the provisions of the ordinances of the City of Covington, Kentucky, mentioned in said petition and involved in said cause, as to the business which your petitioners and plaintiffs in error were engaged in and carrying on in said city at the time mentioned in said petition, did not amount to and were not a regulation of or restraint upon interstate commerce.

Third. The court erred in holding that the provisions of the ordinance of the City of Covington, Kentucky, mentioned in
80 said petition and involved in said cause were not unconstitutional as to the business which your petitioners and plaintiffs in error were engaged in and carrying on in said city at the times mentioned in said petition, and in holding that, as to said business, said provisions did not violate or contravene Paragraph 3 of Section 8, of Article 1, of the Federal Constitution.

Fourth. The court erred in affirming the judgment of the Common Law and Equity Division of the Circuit Court of Kenton County, Kentucky.

Fifth. The court erred in rendering and entering judgment in favor of appellee and against the appellants.

Wherefore, these petitioners and plaintiffs in error pray that the said judgment of the Court of Appeals of the Commonwealth of

Kentucky may be reversed and annulled and held for naught, and that they may be restored to all things which they have lost by the action and because of the said judgment and decision.

WILLIAM H. MACKOY,
HARRY BRENT MACKOY,
Attorneys and Counsel for Plaintiffs in Error.

Endorsed: Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

81 The Court of Appeals of the Commonwealth of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER, and SOPHIE WAGNER, Partners Doing Business under the Firm Name of W. T. Wagner's Sons, Plaintiffs in Error (Appellants),

v.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Defendant in Error (Appelee).

Bond on Petition for Writ of Error.

Know all men by these presents that we, William T. Wagner, Edward Wagner and Sophie Warger, partners, doing business under the firm name of W. T. Wagner's Son as principal-, and the Fidelity and Deposit Company of Maryland, a corporation under the laws of the State of Maryland, as surety, are held and firmly bound unto the City of Covington, a municipal corporation of the second class under the laws of the Commonwealth of Kentucky, in the sum of One thousand dollars ($1000.00), to be paid to the
82 said oligee, its successors or assigns; to the payment of which we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of January 1918.

Whereas the above named plaintiffs in error seeks to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Court of Appeals of the Commonwealth of Kentucky.

Now, therefore, the condition of this obligation is such that, if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

WILLIAM T. WAGNER,
EDWARD WAGNER, &
SOPHIE WAGNER,
Partners under the Name of W. T. Wagner's Sons.
By WM. T. WAGNER.
FIDELITY & DEPOSIT CO. OF MARYLAND,
By E. B. RODMAN, *Atty. in Fact.*

Signed, sealed and delivered in presence of
GEO. T. POOR.
H. B. MACKOY.

[SEAL] RODMAN W. KEENON,
Clerk of the Court of Appeals of Kentucky.

83 STATE OF OHIO,
Hamilton County, ss:

I, Geo. T. Poor, a notary public in and for the county and state aforesaid, hereby certify that on this day the foregoing bond from William T. Wagner, Edward Wagner, and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, to the City of Covington, Kentucky, was duly presented by the parties and acknowledged by said William T. Wagner, who stated that he was duly authorized to execute same for and on behalf of said William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, to be his and their voluntary act and deed.

My commission expires Jan. 25th, 1919.

Witness my hand and notarial seal this 17th day of January, 1918.
[SEAL.] GEO. T. POOR,
Notary Public in and for Hamilton County, State of Ohio.

84 STATE OF KENTUCKY,
Franklin County, ss:

I, Rodman W. Keenon, Clerk of the Court of Appeals in and for the county and state aforesaid, hereby certify that on this day the foregoing bond from William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, to the City of Covington, Kentucky, was duly presented to me by the parties and acknowledged by said E. B. Rodman, who stated that he was duly authorized to execute same for and on behalf of said Fidelity and Deposit Company, as surety, to be his voluntary act and deed and the voluntary act and deed of said corporation. Witness my hand and notarial seal this 22 day of January, 1918.

RODMAN W. KEENON,
Clerk Court of Appeals of Ky.

I hereby approve the foregoing bond and surety this 22nd, day of January, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the Commonwealth of Kentucky.

Endorsed: Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

85 The Court of Appeals of the Commonwealth of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Partners Doing Business under the Firm Name of W. T. Wagner's Sons, Appellants,

v.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Appellee.

Order Allowing Writ of Error.

The above-entitled cause coming on to be heard upon the petition of the appellants therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the Commonwealth of Kentucky, and upon examination and consideration of said petition, the assignment of errors and the record of said cause, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said cause;

86 It is ordered, that a writ of error be and it is hereby allowed from the Supreme Court of the United States to the Court of Appeals of the Commonwealth of Kentucky, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioners and plaintiffs in error give security in the sum of One Thousand Dollars ($1000.00) that the said plaintiffs in error will prosecute said writ of error to effect and, if said plaintiffs in error shall fail to make their plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiffs in error now presenting a bond in the sum of One Thousand dollars, ($1000.00) with the Fidelity & Deposit Co. of Maryland, as surety, it is ordered that the same be and it is hereby duly approved.

In witness whereof, I have hereunto set my hand this 22nd day of January, 1918.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the Commonwealth of Kentucky.

Endorsed: Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

87 Be it remembered that on January 24th, 1918, the Court of Appeals of Kentucky, entered the following order: Said Order is in words and figures as follows, to-wit: viz.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the Commonwealth of Kentucky, Greetings:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court of Appeals of the Commonwealth of Kentucky, before you or some of you, *be*-
the highest court of law or equity of the said Commonwealth
in which a decisions could be had, in the suit between Wil-
88 liam T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, and the City of Covington, a municipal corporation under the laws of Kentucky, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against (or in favor of) their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity or wherein any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of or Commission held or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commissio*ner* or authority, a manifest error hath happened to the great damage of the said William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons as by its complaint appears. We being willing that error, if any hath
been, should be duly corrected, and full and speedy justice
89 done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.] J. W. MENZIES,
Clerk of the District Court of the United States
for the Eastern District of Kentucky,
By M. VAN D. BELL, *Deputy.*

Allowed by
W. E. SETTLE,
Chief Justice of the Court of Appeals
of the Commonwealth of Kentucky.

Endorsed and filed: Jan. 22, 1918. R. W. Keenon, C. C. A.

90 Be it remembered that on the 22nd. January, 1918, the following order was entered: Said Order is in words and figures as follows to-wit:

Citation to Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

To the City of Covington, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date of service of this citation, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the Commonwealth of Kentucky, wherein William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in
91 the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable, the Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 22nd day of January in the year of our Lord one thousand nine hundred and eighteen.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the
Commonwealth of Kentucky.

Attest:
RODMAN W. KEENON,
Clerk of the Court of Appeals of the
Commonwealth of Kentucky.

The defendant in error (appellee) hereby acknowledges service of a copy of the attached and foregoing citation and a copy of the

writ of error herein, and accepted notice thereof and of the filing of the original thereof this 24th day of January, 1918.

CITY OF COVINGTON,
By A. E. STRICKLETT,
City Solicitor.

Endorsed and filed: Jan. 24th, 1918. R. W. Keenon, C. C. A.

92 The Court of Appeals of the Commonwealth of Kentucky.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, Partners, Doing Business under the Firm Name of W. T. Wagner's Sons, Plaintiffs in Error (Appellants),

vs.

CITY OF COVINGTON, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Defendant in Error.

Precipe.

To the Clerk of the Court of Appeals of the Commonwealth of Kentucky:

The plaintiffs in error (appellants) having duly filed their petition in error herein, and same having been allowed and a writ of error granted and issued, to the Supreme Court of the United States, you are hereby directed and requested to incorporate the following portions of the record in this action into the transcript of the record for the purpose of said writ of error, viz:

1. Petition of plaintiffs in error (appellants) filed in Kenton Circuit Court May 15, 1914.

2. Summons issued on said petition May 15, 1914.

3. Return upon summons showing services on defendant in error (appellee) May 15, 1914.

4. Answer of defendant in error (appellee) filed December 14, 1914.

5. Supplemental petition filed by plaintiffs in error (appellants) May 17, 1915.

93 6. Agreed statement of facts filed in Kenton Circuit Court September 20, 1915.

7. Agreed order submitting cause for final judgment in Kenton Circuit Court September 20, 1915.

8. Judgment of Kenton Circuit Court rendered and entered May 15, 1916.

9. Motion of plaintiffs in error (appellants) to vacate decision and for new trial, filed in Kenton Circuit Court May 29, 1915.

10. Order of Kenton Circuit Court entered June 5, 1916, overruling motion to vacate and for new trial, and granting an appeal to the Court of Appeals.

11. Judgment of the Court of Appeals rendered and entered October 26, 1917.

12. Opinion of the Court of Appeals filed and entered October 26, 1917.

13. Petition for rehearing filed by plaintiffs in error (appellants) in the Court of Appeals on November 26, 1917.

14. Order of Court of Appeals entered December 21, 1917, overruling petition for rehearing filed by plaintiffs in error (appellants).

15. Petition for writ of error to Supreme Court of the United States filed by plaintiffs in error (appellants) January 22, 1918.

16. Assignment of errors and prayer for reversal upon petition for above writ of error, filed by plaintiffs in error (appellants)
94 January 22, 1918.

17. Bond on petition for writ of error filed by plaintiffs in error (appellants) January 22, 1918.

18. Order allowing writ of error entered January 22, 1918.

19. Writ of Error granted January 22, 1918.

20. Citation to defendant in error issued January 22, 1918.

21. This precipe now filed herein.

WILLIAM H. MACKOY &
HARRY BRENT MACKOY,
Attorneys and of Counsel for Plaintiffs in Error.

The defendant in error (appellee) hereby acknowledges service of a copy of the above precipe and accepts notice of the filing of said original precipe this 24th day of January, 1918.

CITY OF COVINGTON,
By A. E. STICKLETT,
City Solicitor.

Endorsed: Filed Jan. 24, 1918. R. W. Keenon, C. C. A.

95 Court of Appeals of the State of Kentucky.

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the record called for in the praecipe, filed by the Appellant now the plaintiff in error, William T. Wagner, Edward Wagner and Sophie Wagner, doing business under the name of W. T. Wagner's Sons, vs. The Appellee, now defendant in error, City of Covington, a municipal corporation under the laws of the Commonwealth of Kentucky and the original citation and Writ of Error which are to be used by said Appellant, now plaintiff in error, upon the appeal from a judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States.

In testimony whereof, witness my hand *in* seal of this Office, this January 29, 1918.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

Fee $36.40.

96 *Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable the Justices of the Court of Appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the Commonwealth of Kentucky, before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had, in the suit between William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, and the City of Covington, a municipal corporation under the laws of Kentucky, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against (or in favor of) their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity or wherein any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of or Commission held or authority exercised under the United States, and the decision was againstt the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and
97 speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 22nd day of January, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.] J. W. MENZIES,
Clerk of the District Court of the United States for the Eastern District of Kentucky.
By M. VAN D. BELL, *Deputy.*

Allowed by
W. E. SETTLE,
Chief Justice of the Court of Appeals of the Commonwealth of Kentucky.

98 [Endorsed:] Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

99 *Citation to Defendant in Error.*

UNITED STATES OF AMERICA, ss.

To the City of Covington, a Municipal Corporation under the Laws of the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date of service of this citation, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of the Commonwealth of Kentucky, wherein William T. Wagner, Edward Wagner and Sophie Wagner, partners, doing business under the firm name of W. T. Wagner's Sons, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable, the Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 22nd day of January in the year of our Lord one thousand nine hundred and eighteen.

W. E. SETTLE,
Chief Justice of the Court of Appeals of the Commonwealth of Kentucky.

Attest:
RODMAN W. KEENON,
Clerk of the Court of Appeals of the Commonwealth of Kentucky.
By ——— ———, *Deputy.*

100 The defendant in error (appellee) hereby acknowledges service of a copy of the attached and foregoing citation and a copy of the writ of error herein, and accepts notice thereof and of the filing of the originals thereof this 24th day of January, 1918.

CITY OF COVINGTON,
By A. E. STRICKLETT,
City Solicitor.

101 [Endorsed:] Filed Jan. 22, 1918. R. W. Keenon, C. C. A.

Endorsed on cover: File No. 26339. Kentucky Court of Appeals. Term No. 872. William T. Wagner, Edward Wagner, and Sophie Wagner, partners doing business under the firm name of W. T. Wagner's Sons, plaintiffs in error, vs. The City of Covington. Filed February 18th, 1918. File No. 26339.

Supreme Court, U. S.
FILED
MAR 11 1919
JAMES D. MAHER,
CLERK

(26,339.)

Supreme Court of the United States

OCTOBER TERM, 1918. No. [redacted]61

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, partners doing business under the firm name of W. T. Wagner's Sons,

Plaintiffs in Error,

vs.

CITY OF COVINGTON,

Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiffs in Error.

HARRY BRENT MACKOY,
Counsel for Plaintiffs in Error.

WILLIAM K. MACKOY,
Of Counsel.

COURT INDEX PRESS, 648-650 Main Street, Cincinnati, O., March, 1919.

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Supreme Court of the United States

OCTOBER TERM, 1917. No. 872.
OCTOBER TERM, 1918. No. 363.

WILLIAM T. WAGNER, EDWARD WAGNER and SOPHIE WAGNER, partners doing business under the firm name of W. T. Wagner's Sons,

Plaintiffs in Error,

vs.

CITY OF COVINGTON,

Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief for Plaintiffs in Error.

STATEMENT OF THE CASE.

This writ of error is prosecuted from a final judgment of the Court of Appeals of the State of Kentucky entered October 26th, 1917, affirming a judgment rendered May 15, 1916, by the Common Law and Equity Division of the Circuit Court of Kenton County, Kentucky, in an action wherein plaintiffs in error were plaintiffs and defendant in error was defendant. After the rendition of said

judgment by the Court of Appeals, a petition for rehearing was denied by it December 1st, 1917.

In said action plaintiffs, who are manufacturers and wholesalers of "soft drinks," having their residence and place of business in Cincinnati, Ohio, sought to recover of defendant, which is a municipal corporation of the second class, organized, existing and acting under the statutes of the state of Kentucky, certain license fees for selling such drinks at wholesale, which they had paid under and pursuant to two ordinances passed April 30th, 1910, and April 30th, 1914, and also sought to enjoin the enforcement by the city, as to plaintiffs, of a later ordinance passed April 30th, 1915.

Said ordinances required licenses for the *right* to carry on certain occupations, professions and trades in said city, including the business of plaintiffs in error; prescribed the manner of issuing licenses and of apportioning the revenue therefrom; and provided penalties for failure to take out such licenses before engaging in such businesses in the city.

The ordinances were not police regulations in any sense of the word, but were revenue measures pure and simple. Their effect was as to plaintiffs in error, to prohibit the sale at wholesale of certain wholesome, legitimate articles of commerce, unless they should first pay a tax to the city *for the privilege of making such sale.* (Record, pages 20-21, etc.) Their provisions, therefore, imposed a direct burden upon the right to make such sales at wholesale, which is the usual and generally recognized manner and form in which sales must be made, where the transactions involve "original packages." (*Armour & Co.* v. *North Dakota*, 240 U. S., 510; 60 L. Ed., 771, 776.)

Under the decisions of the Court of Appeals of Kentucky, where an ordinance of a city requiring a license

fee imposes a fine or imprisonment, or both, for non-payment, and the said license fee is paid, it is regarded as being paid under duress and may be recovered by action. (*Spalding* v. *City of Lebanon*, 156 Ky., 37; *City of Lebanon* v. *Humkey*, 161 Ky., 454.)

The grounds on which plaintiffs based their action were that their business in said city was interstate commerce; that the provisions of said ordinances were a regulation of and restraint upon such commerce; that said provisions were, therefore, unconstitutional in that they violated and contravened Paragraph 3, of Section 8, of Article I of the Federal Constitution.

The action was submitted to the trial court upon *an agreed statement of facts* (Record, pages 18-21). That court handed down an opinion, in which it stated that, were the case before it one of first impression, it would hold the business of plaintiffs in the City of Covington to be interstate commerce, but that, inasmuch as the Court of Appeals had decided the law differently in a somewhat similar case (*City of Newport* v. *Wagner*, 168 Ky., 641), it would have to abide by the decision of that court. The trial judge carefully analyzed the previous opinions of this court and indicated that they did not support the earlier decision of the Court of Appeals, but that, in the absence of an express ruling on the point by this court, he would have to follow the interpretation of the law given to the question of interstate commerce by the highest court of his own state. He, therefore, entered a judgment dismissing the petition (Record, page 22).

When this case reached the Court of Appeals of Kentucky, it affirmed the judgment of the trial court upon the authority of its previous rulings in *City of Newport* v. *Wagner, supra*, and *City of Newport* v. *French Bros.*-

Bauer Co., 169 Ky., 174 (Record, pages 24-28). It may be here stated that the two cases last mentioned, which were remanded to the Circuit Court of Campbell County, Kentucky, for further proceedings, are still pending in that court. No writ of error to this court has ever been taken, or attempted to be taken therefrom, because no final judgment has been entered from which a writ or error would lie.

The present is one of two similar cases, in which writs of error were prosecuted at the same time to said Court of Appeals of Kentucky, the other being the case of *Gilligan* v. *City of Covington*, No. 873 on the docket of this court for the October Term, 1917. By stipulation between the parties it has been agreed that both cases may be submitted, argued and heard upon one record, which alone has been printed, to-wit, the record in this case, and that all parties in both cases will abide by the decision of the court upon the facts and the law in this record.

SPECIFICATION OF ERRORS RELIED UPON.

The errors assigned by plaintiffs in error and which are relied upon herein are as follows (Record, page 35), viz:

> First. The court erred in holding that the business which your petitioners and plaintiffs in error were engaged in and carrying on in the City of Covington, Kentucky, at the times mentioned in the petition filed in said record and proceedings was not interstate commerce.
>
> Second. The court erred in holding that the provisions of the ordinances of the City of Covington, Kentucky, mentioned in said petition and involved in said cause, as to the business which your petitioners and plaintiffs in error were en-

gaged in and carrying on in said city at the time mentioned in said petition, did not amount to and were not a regulation of or restraint upon interstate commerce.

Third. The court erred in holding that the provisions of the ordinances of the City of Covington, Kentucky, mentioned in said petition and involved in said cause were not unconstitutional as to the business which your petitioners and plaintiffs in error were engaged in and carrying on in said city at the times mentioned in said petition, and in holding that, as to said business, said provisions did not violate or contravene Paragraph 3, of Section 8, of Article I, of the Federal Constitution.

Fourth. The court erred in affirming the judgment of the Common Law and Equity Division of the Circuit Court of Kenton County, Kentucky.

Fifth. The court erred in rendering and entering judgment in favor of appellee and against the appellants.

ARGUMENT.

I.

STATEMENT AS TO CHARACTER OF BUSINESS DONE BY PLAINTIFFS IN ERROR IN THE CITY OF COVINGTON, KY., AND THE NATURE OF THEIR CLAIMS.

It will be noted that the business of plaintiffs in error in the city of Covington possesses the following characteristics (Record, pages 18-21), viz:

(a) The goods are shipped from Ohio and sold and delivered at wholesale in Kentucky in the "original packages" of commerce, which are

not broken or changed in any way before sale or delivery.

(b) The goods are always in transit and not at rest, except during the short pause incidental to delivery.

(c) The goods, when shipped, are appropriated in a practical, if not in a technical, sense to the fulfillment of contracts with certain specific existing customers, with whom a general understanding is previously had that plaintiffs in error will furnish them with such drinks as they may need or desire to purchase of them.

(d) The goods are not carried into Kentucky for the purpose or with the intention of having them remain there permanently, or for an indefinite period, or for sale to the general public; but are carried into the state "merely for a temporary purpose," which is either to apply them to fulfilling said contracts, or to carry back into Ohio the part not so applied. This is all done and intended to be done on the same trip of the same vehicle, which consumes at the most but a few hours.

(e) The goods are never hawked about, peddled, offered or sold to the public generally.

(f) The goods are not sold by a resident or permanent agent in Kentucky, or by any one who is engaged in doing other business in that state.

(g) Plaintiffs in error themselves are nonresidents of Kentucky and have no factory, office, warehouse or other place of business in that state.

(h) The vehicle always carries sufficient goods on its regular trips, shipped and packed as described, to meet the probable demands of the customers based on past experience, but with the exception of such goods, loaded on the vehicle and in process of transportation, plaintiffs in error have no goods in Kentucky at any time.

It is claimed by plaintiffs in error that the course of dealing in their business in Covington, as just described, constitutes a continuous current of commerce between themselves as residents of Ohio and their standing customers in Kentucky. That from the time when their goods leave their place of business in Ohio in the "original packages" of commerce up to the moment of their delivery to such customers, they must be regarded as being in interstate commerce. That, under the decisions of this court, said "original packages" do not become part of the general mass of property in the State of Kentucky until *after* the sale and delivery to the customers, and hence are not subject to state regulation or control in the hands of plaintiffs in error.

It is further claimed by plaintiffs in error that, being so engaged in interstate commerce, and the goods so shipped by them being a part of such commerce, the City of Covington can not require a license to be taken out for the sale, because it imposes a direct burden upon interstate commerce.

They claim, also, that, although a state has power to tax goods which have been imported into it from another state, after they arrive at their destination or come to rest therein, even while remaining in the "original packages," and unsold, this power does not extend to the taxation of such packages while temporarily within the state, which are in course of transportation or which are being held therein only long enough to find out the exact needs of the customers. Such interruptions are necessarily incident to and part of the right which the importer has to sell, and, according to the previous rulings of this court, can not affect the interstate nature of the transactions when viewed in their entirety.

Finally, plaintiffs in error claim that the Court of Appeals of Kentucky, both in the present case and in the earlier opinions on which this decision is based, has misinterpreted the facts and the law of interstate commerce applicable to them, as laid down by this court. That, instead of viewing the whole transaction in each case, it has seized upon certain isolated or particular features in determining the questions at issue, and has said, for instance, that, because sales are consummated in Kentucky, they therefore are intrastate and not interstate dealings; or it has said that "the moment the driver halts his vehicle in front of a retail dealer's place of business for the purpose of negotiating a sale, and there exposes his goods for sale, the goods obtain a situs and are subject to the laws and taxing power of the Commonwealth." (Record, page 27.)

It is maintained by plaintiffs in error that the place where the sale is made or where title passes does not determine what is or is not interstate commerce, and that the Court of Appeals is not correct, if it means to say that the goods carried into Kentucky in the manner and form herein described become a part of the general mass of property within that state so as to take them out of interstate commerce. As said by this court, "what is commerce among the states is a question depending upon broader considerations than the existence of a technically binding contract"; and "commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." (*Swift & Co.* v. *United States*, 196 U. S., 375, 49 L. Ed., 518, 525; *Dozier* v. *Alabama*, 218 U. S., 124, 54 L. Ed., 965, 967.)

In support of the foregoing contentions plaintiffs in error submit the following propositions and authorities:

II.

Statement of Propositions of Law Involved and Authorities in Support of Same.

1.

Interstate commerce not subject to state regulation or control. Requiring license fee for privilege of engaging therein is a direct burden.

It is fundamental that interstate commerce can not be regulated or controlled by a state, or a subdivision thereof, without the consent of Congress. It is also well established that the requiring of a license for the privilege of doing interstate commerce in a state, or subdivision thereof, from a foreign individual or corporation is a *direct* burden upon such commerce.

Pullman Palace Car Co. v. *Pennsylvania*, 141 U. S., 18 (35 L. Ed., 613).

Brennan v. *Titusville*, 153 U. S., 289 (38 L. Ed., 719).

Caldwell v. *North Carolina*, 187 U. S., 622 (47 L. Ed., 336).

Rearick v. *Pennsylvania*, 203 U. S., 507 (51 L. Ed., 295).

Dozier v. *Alabama*, 218 U. S., 124 (54 L. Ed., 965).

Sault Ste. Marie v. *International Transit Co.*, 234 U. S., 333 (58 L. Ed., 1337), and cases there cited.

2.

Right of sale in "original packages" is a necessary incident to right to import, and continues until packages are commingled with the general mass of property.

The person who imports goods in "original packages" from one state into another has the right to sell them in such packages in the latter state as a necessary incident to the right to import, without being subject to state regulation or control, and this right continues until the original packages are commingled with the general mass of property in the state either by actual sale, or by breaking up the packages, or by some other act which indicates that they are to be so commingled.

Leisy v. *Hardin*, 135 U. S., 100 (34 L. Ed., 128).
Lyng v. *Michigan*, 135 U. S., 161 (34 L. Ed., 150).
Schollenberger v. *Pennsylvania*, 171 U. S., 1 (43 L. Ed., 49).
Austin v. *Tennessee*, 179 U. S., 343 (45 L. Ed., 224).
Cook v. *Marshall County*, 196 U. S., 261 (49 L. Ed., 471).
Purity Extract Co. v. *Lynch*, 226 U. S., 192 (57 L. Ed., 184).
Adams Express Co. v. *Kentucky*, 238 U. S., 190 59 L. Ed., 1267).
Price v. *Illinois*, 238 U. S., 446 (59 L. Ed., 1400).
Rosenberger v. *Pacific Express Co.*, 241 U. S., 48 (60 L. Ed., 880).

An examination of the decisions of courts of last resort in the various states shows that all of them are in accord with this rule, and, so far as we have been able to find, Kentucky stands alone in holding to the contrary.

In the following cases the rule has been recognized, and wherever the license has been sustained, it has only been where the packages have become commingled with property in the state:

State v. *Delaye* (Ala.), 68 So., 993, 995.
Hall v. *State of Florida*, 39 Fla., 637, 676.
Parks Bros. & Co. v. *Nez Perce County*, 13 Idaho, 298.
Carrollton v. *Bazzette*, 159 Ill., 284, 292, 293.
State v. *Lowry*, 166 Ind., 372, 382, 383.
McGregor v. *Cone*, 104 Iowa, 465, 469-471.
State v. *Pabst Brewing Co.*, 128 La., 770, 771.
Commonwealth v. *Gussman*, 215 Mass., 349, 350.
People v. *Sawyer*, 106 Mich., 428, 431.
St. Louis v. *Wortman*, 213 Mo., 131, Syl. 7.
Ex parte Agnew (Neb.), 131 N. W., 817.
People v. *Schmidt*, 218 N. Y., 256, 258.
State v. *Armour* (N. Dak.), 145 N. W., 1033, 1042.
Commonwealth v. *Harmel*, 166 Penna., 89, 95.
Kimmell v. *State*, 104 Tenn., 184, 186.
State v. *Goetze*, 43 W. Va., 495, 502.
McDermott v. *State* (Wis.), 126 N. W., 888, 891.

3.

A current of commerce created by importing goods from one state into another continues until they have reached their final destination. A temporary interruption necessary to consummate a purchase does not destroy the interstate character of the transaction.

Where goods are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase in the same form in another state, and when in effect they do so, with only the interruption necessary to

consummate the purchase at the point of destination, and when this is a typical, constantly recurring course of business, "the current thus existing is a current of commerce among the states" and the purchase of the goods is a part and incident of such commerce. Such was decided to be the law in *Swift & Co.* v. *United States*, 196 U. S., 375 (49 L. Ed., 518, 525), where the shipment was of cattle. Mr. Justice Holmes said:

> "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."

See also to the same effect:

Caldwell v. *North Carolina*, *supra*.
Rearick v. *Pennsylvania*, *supra*.
Dozier v. *Alabama*, *supra*.

The current does not cease to flow until the articles are delivered to the persons for whom they are intended, or to whom they are destined to be sold, even though the consignor ships them at the starting point by a common carrier consigned to himself at the point of destination, and he makes delivery of them to such persons instead of by the common carrier, and even though the title does not pass until then.

Caldwell v. *North Carolina*, *supra*.
Rearick v. *Pennsylvania*, *supra*.

Crenshaw v. *Arkansas*, 227 U. S., 389 (57 L. Ed., 565).
Stewart v. *Michigan*, 232 U. S., 665 (58 L. Ed., 786).
Western Oil Refining Co. v. *Lipscomb*, 244 U. S., 346 (61 L. Ed., 1181).
York Mfg. Co. v. *Colley*, 247 U. S., 21 (62 L. Ed., 963).

In each of the last-mentioned cases, when the article sold was started to move, the intention that it was to be delivered to the other was absolute—that is, it was started to move in pursuance of a previously existing definite contract of sale—but this is not essential. It is sufficient that the intention be conditional, depending upon the ability to negotiate a sale upon exhibition or after pause for negotiation; or it suffices if the article is started because of an expectation to sell.

Swift & Co. v. *United States*, *supra*.
Dozier v. *Alabama*, *supra*.
Coe v. *Errol*, 116 U. S., 517 (29 L. Ed., 715).
Kelley v. *Rhoades*, 188 U. S., 1 (47 L. Ed., 359).
Davis v. *Virginia*, 236 U. S., 697 (59 L. Ed., 795).

See also *General Oil Co.* v. *Crain*, 209 U. S., 211 (52 L. Ed., 754), where the question is discussed as to when the transit of goods commenced in another state may be deemed to have been temporarily interrupted or terminated so as to subject the goods to local taxation.

4.

"Original packages" of interstate commerce themselves only become taxable when they have come to rest at their destination or have become part of the general mass of property in the state.

The above proposition is supported by the following authorities:

Woodruff v. *Parham*, 8 Wall., 123 (19 L. Ed., 382).
Hinson v. *Lott*, 8 Wall., 148 (19 L. Ed., 387).
Brown v. *Houston*, 114 U. S., 622 (29 L. Ed., 257).
Robbins v. *Taxing Dist. of Shelby Co.*, 120 U. S., 489 (30: 694, 697).
Pittsburgh & S. Coal Co. v. *Bates*, 156 U. S., 577 39 L. Ed., 538).
American S. & W. Co. v. *Speed*, 192 U. S., 500 (48 L. Ed., 538).
Kehrer v. *Stewart*, 197 U. S., 60 (49 L. Ed., 663).

In *all* the foregoing cases the questions presented were as to the power of a state to tax persons having a situs within its jurisdiction and dealing in "original packages" of commerce; or as to its power to tax articles of commerce after they had come to rest in the state, or were being held there indefinitely for purposes of sale to the general public, like other property within the state. The court held that, under such circumstances, a tax could be imposed.

A brief reference to a few of said cases will show that such was their effect:

In *Woodruff* v. *Parham*, 8 Wall., 123 (19 L. Ed., 382, 386), the plaintiff in error who was held liable for the

tax, was an auctioneer residing and carrying on his business regularly in the city of Mobile, where the goods were sold. He did not import the goods himself, but was employed to sell them for third persons, doing so as a part of his regular business in that city; and, as said in *Brown* v. *Houston*, the transaction "had no relation to the movement of goods from one state to another." (See below.)

Brown v. *Houston*, 114 U. S., 622 (29: 257), was a case involving the right to impose a tax on coal which had been shipped in bulk into Louisiana on a barge, and was to remain there permanently or indefinitely for sale to the general public. The court said:

> "The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state."

After holding that the tax could be imposed, the court went on to add (L. Ed., p. 261):

> "We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the City of New York, charged with the duty of collecting a tax on every wagon-load, or car load of produce and merchandise brought into the city, that it would not be a regulation of and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other states. We think it would be, and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of *Woodruff* v. *Parham* (*supra*), which had no relation to the movement of goods from one

> state to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city, and in precisely the same manner."

In *Robbins* v. *Taxing Dist. of Shelby Co.*, 120 U. S., 489 (30:694, 697), we find the following:

> "As soon as the goods are in the state *and* become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston*, 114 U. S., 622 (29 L. Ed., 257)." (Emphasis ours.)

It is true that the court there did say, in a dictum, that the sending of property from one state to another for a sale might make it part of the mass of property in the state, so as to subject it to a tax, but the court evidently had in mind the sending of property to remain there for a permanent or an indefinite period, and to be offered to the general public; or that said property was not to be sold in "original packages," because both the decisions relied on (*Brown* v. *Houston*, *supra*, and *Machine Co.* v. *Gage*, 100 U. S., 676), were cases of that character; and the facts of the case at bar showed that they were not speaking of "original packages." Moreover the court had just recognized that the bringing of goods into the state for a temporary purpose did not commingle them with the property of the state, because it said on pp. 493-494:

"But in making such internal regulations a state can not impose taxes upon persons passing through the state, or coming into it *merely for a temporary purpose, especially if connected with interstate or foreign commerce;* nor can it impose such taxes upon property imported into the state from abroad, or from another state, *and not yet become part of the common mass of property therein.*" (Emphasis ours.)

In *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500 (48 L. Ed., 538), the power of the State to impose a merchant's tax on one selling goods in "original packages," which were stored in the state for sale, was involved. The court upheld the taxing power, but did so upon the express ground that the goods had reached their destination, were being held in the state for sale and were enjoying the protection which the laws of the state afforded. Discussing the effect of its previous opinions in *Woodruff* v. *Parham* and *Brown* v. *Houston*, it said:

"In order to fix the period when interstate commerce terminated the criterion announced in *Brown* v. *Maryland* * * * that is, sale in the original packages at the point of destination * * * was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they *had not been sold in the original packages.* As, however, they had arrived at their destination, were *at rest in the State, were enjoying the protection which the laws of the State afforded*, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." (Emphasis ours.)

In *Kehrer* v. *Stewart*, 197 U. S., 60 (49 L. Ed., 663), the statement of facts shows that meats were shipped from Chicago to Atlanta, and there *stored and held in the Atlanta house* of the shippers to be sold in the ordinary course of business to such customers as might require them. The tax was upon a *resident manager* of the shipper, and it was held that, under such circumstances, the resident agent was liable for the tax.

5.

There is a distinction between the right to impose a tax on the non-resident importer for the privilege of selling goods in the "original packages" and the right to impose a tax on the "original packages" themselves after they reach their destination and come to rest in the state.

This difference is well stated in the lately published Encyclopedia of United States Supreme Court Reports, No. 7, pages 298-300, in the following language, which is supported by references to numerous cases in the notes to the text, viz.:

> "Where goods are transported from one state to another or from a foreign country into the United States, interstate or foreign commerce in such goods is not completely terminated, and they are protected by the commerce clause *until after their sale at the point of designation in the original packages*, in the absence of congressional legislation permitting state laws to attach prior to such sale. The right to import lawful articles of commerce from foreign countries into the United States or from one state into another

free from state interference or regulation, *includes, by necessary implication, the right of the importer to sell the goods imported in the original unbroken packages at the place where the importation terminates*, although to do so may be contrary to state laws. The very purpose and motive of that branch of commerce consist in the sale and exchange of the commodities transported. As a state can not prevent the importation of a lawful article of commerce or prohibit its sale by the importer in the original package in which it was imported, so it *can not impose any conditions upon the right to sell, as for example by requiring a license to be taken out to sell imported goods while remaining in the original packages. However, it has been held that when goods transported from one state into another arrive at their destination or come to rest in the latter state, they may be taxed by the state, if taxed like other property situated in the state is taxed, even while remaining in the original packages and unsold.* The importer may sell the original packages personally or he may employ an agent to sell them for him. The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sell in the original packages." (Emphasis ours.)

6.

There is also a distinction between the right to impose a tax on an importer who is using persons licensed by the state to make sales for him within the state and the right to impose a tax on the importer himself for making such sales, as is sought to be done here.

This court has always made a difference in the above two classes of cases since the decision of Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419 (6 L. Ed., 678).

In *Hopkins* v. *United States*, 171 U. S., 578 (43 L. Ed., 290), the question arose as to the power of the Kansas City Live Stock Exchange to require a charge of local agents for selling cattle shipped from outside the state. The court, among other things, said:

> "The selling of an article at its destination, which has been sent from another state, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce."
>
> * * * * *
>
> "In *Brown* v. *Maryland*, 12 Wheat., 419 (6:678), Chief Justice Marshall, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auctioneer to do it for him, and he said in the latter case the importer could not object to paying for such services as for any other, and that the right

to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid.

"The same view is enforced in *Emert* v. *Missouri*, 156 U. S., 296 (39:430, 5 Inters. Com. Rep., 68).

"The right of the cattle owners themselves to sell their own cattle is not affected or touched by the agreement in question, while the privilege of having their cattle sold for them at the market place frequented by defendants, and with the aid of one of them, is a privilege which they are charged for, and which is not annexed to their right to sell their own cattle."

7.

The so-called "peddler" cases do not apply to the facts here.

The so-called "peddler" cases, *Howe Machine Co.* v. *Gage*, 100 U. S., 676 (25 L. Ed., 754), and *Emert* v. *Missouri*, 156 U. S., 296 (39 L. Ed., 430), do not apply to the facts here, because the license here involved is one for dealing at wholesale in "soft drinks," and under the decisions of the Court of Appeals of Kentucky and the statutes of that state, the plaintiffs in error are not engaged in a peddling business. (*City of Newport* v. *French Bros.-Bauer Co.*, 169 Ky., 174; 183 S. W., 532, 536-7.) Moreover, the business there carried on was purely intra-state, as an examination of the two cases will show.

In *Howe Machine Co.* v. *Gage* the validity of a non-discriminating statute of Tennessee imposing a license tax on peddlers of sewing machines was involved. A Connecticut manufacturer of such machines had an agent at Nashville. It shipped them there and sent the agent from that place to sell them in a certain county. It was claimed that he was a peddler and subject to tax. The statute was held valid. It is clear that the sewing machines in the hands of the agent were not in and the subjects of intrastate commerce. The current of interstate commerce which began to flow on the movement of the machines from Connecticut to Tennessee ceased to flow on their delivery to the agent in charge of the agency at Nashville. They were then in the state to stay, *i. e.*, were at rest. What took place thereafter was purely intrastate commerce.

In *Emert* v. *Missouri* the validity of a non-discriminating statute of Missouri imposing a license tax upon peddlers of goods was involved. An agent of a New Jersey manufacturer of sewing machines went from place to place in that state selling and trying to sell sewing machines for such manufacturer. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. It did not appear that the manufacturer had an agency or place of business in the state from which the agent went out to sell its machines but that such was the case was not negatived. Presumably it was the case. Mr. Justice Gray said:

> "His dealings were neither accompanied nor followed by any transfer goods, or of any order for their transfer, from one state to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce

> in which he was engaged was internal or domestic; and so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power of the state."

In *Watters* v. *People of the State of Michigan*, decided December 9, 1918, Advance Opinions, January 1, 1919, No. 4, page 57, the court had before it the question of a peddler's license, and sustained the judgment of the Michigan court upholding the validity of the ordinance on the ground that plaintiff in error had sold "two cans of toilet cream that were *at rest in the state before the sale*," which transaction was admittedly not protected from state legislation. The facts are not fully set forth in the opinion, but we submit that, from the brief statement of Mr. Justice Holmes, the decision supports our contentions here.

See, also, *Crenshaw* v. *Arkansas*, *supra*, wherein *Emert* v. *Missouri* is analyzed.

8.

Statement by Court of Appeals of Kentucky that property here acquires a situs whenever driver stops his vehicle in front of a retail dealer's place of business for purpose of negotiating a sale, discussed and shown to be wrong.

The Court of Appeals of Kentucky, when it held in this case that the property dealt in by plaintiffs in error acquires a situs in Kentucky "the moment the driver halts

his vehicle in front of a retail dealer's place of business for the purpose of negotiating a sale," certainly could not have meant that it acquired a situs for purpose of taxation, because in many other well-considered cases, which have never been overruled, it has decided that, in order to be taxable by the state, personalty must have a permanent situs therein.

In *Commonwealth* v. *Haggin*, 30 K. L. R., 788, 790, the Court of Appeals of Kentucky said:

> "The situs of tangible personal property for purposes of taxation is in the state in which it is *permanently* located." (Emphasis ours.)

The above case has been followed and approved by the same court in a number of later decisions, including *Commonwealth* v. *Prudential Life Insurance Co.*, 149 Ky., 380, 383, etc., where the Kentucky authorities, as well as the opinions of this court are fully reviewed. No where has the case been departed from, nor has it been expressly overruled. On the contrary, we find this statement in *Commonwealth* v. *Union Refrigerator Transit Co.*, 118 Ky., 131, 137):

> "And whatever may be said as to the judicial utterances of other jurisdictions, our court has *uniformly* held that, for the purpose of taxation, the situs of personal property of every description is *the domicile of the owner*." (Emphasis ours.)

If the Court of Appeals means that the goods of plaintiffs in error are by the said act at rest in Kentucky, the statement is not true, if the property does not then become part of the mass of property in the state, and it can not be said that it is such a part for it is not permanently or indefinitely at rest. The pause is simply a tem-

porary one and is made as a part of, or in connection with and as an inducement to, an interstate transaction. These facts, therefore, bring the case squarely within the rule laid down in *Robbins* v. *Taxing Dist. of Shelby County* and afterwards applied in *Swift & Co.* v. *United States*, *supra*.

Inasmuch as the present case involves primarily the question as to whether the transactions of plaintiffs in error in the City of Covington, Kentucky, are interstate or intra-state, and the determination of such question depends in part upon whether their goods have become part of the general property in the state, thereby acquiring a situs in Kentucky before sale and delivery to the retail dealer, it will be readily seen that the Court of Appeals has really begged the question at issue, and this court is not in any way bound by that opinion. The rule that personalty to be taxable by a state must have a permanent situs therein has been enunciated by this court in

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 196 (29 L. Ed., 158).
Pickard v. *Pullman Southern Car Co.*, 117 U. S., 34 (29 L. Ed., 785).
Fargo v. *Hart*, 193 U. S., 490 (48 L. Ed., 761).

In the last mentioned case the proposition is distinctly put:

> "The general principles to be applied are settled. A state can not tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property *permanently* within its jurisdiction, although belonging to persons domiciled elsewhere and used in commerce among the states." (Emphasis ours.)

It is true that the foregoing case involved property *used* and not carried in interstate commerce, but we submit that the question of situs for purposes of taxation is the same in either case.

9.

Fact that containers of drinks are temporarily held in Kentucky until driver calls for them can not affect the questions here at issue.

The agreed statement of facts shows that in practically all instances the retail dealers purchase only the waters contained in the bottles and that the bottles and cases remain the property of plaintiffs in error and are subsequently collected and returned to them by their drivers on subsequent regular trips, after a temporary stay in the possession of the purchasers. This point was not referred to in the opinion of the Court of Appeals, and we do not believe that it affects the questions here presented, because the tax under consideration is not on the property, but on the *privilege* of doing business. The distinction has frequently been recognized by this court, and in the recent case of *Wells, Fargo & Co. v. State of Nevada*, decided December 16, 1918, Advance Opinions January 15, 1919, No. 5, page 73, the court said:

> "The difference is vital, for, consistently with the commerce clause of the Federal Constitution, the state could not tax *the privilege* or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce." (Emphasis ours.)

See also cases cited in that opinion.

If it should be contended that this temporary holding of the containers makes the character of the sales intrastate, we feel that it would be sacrificing the substance of the transactions to their form. The use of the containers is only an incident to the sale, and what is really sold is the liquid carried therein. Moreover, the containers are always in and a part of interstate commerce.

If the City of Covington were to attempt to collect an advalorem tax on such containers while situated there, it is possible that same might be sustained upon the basis of an average number at all times within its jurisdiction, as has been permitted in the case of taxation of railroad cars, but such a tax would have to be uniform and equal with other personal property taxes levied, and not a mere arbitrary fixed sum. Property so situated must be taxed "without discrimination, like other property situated within the state."

> *Darnell & Son Co.* v. *Memphis*, 208 U. S., 113 (52 L. Ed., 413).

This court has repeatedly held that, in construing what is interstate commerce, it will not follow "a technical legal conception, but a practical one drawn from the course of business." If, therefore, the general course of business pursued by plaintiffs in error is one involving sales between residents of different states, wherein property passes from one state to another, all details of form should be disregarded and the substance of the transactions control.

> *Swift & Co.* v. *United States*, *supra*.
> *Rearick* v. *Pennsylvania*, *supra*.
> *Dozier* v. *Alabama*, *supra*.

10.

If construction here contended for should result in discrimination against citizens of Covington, Ky., it can make no difference.

The fact that the construction of the ordinances in question here contended for may result in a discrimination against citizens of Covington, Kentucky, can make no difference.

This was held to be the rule in the leading case of *Phila. & R. R. Co. v. Pennsylvania*, 15 Wall., 232 (21 L. Ed., 146, and again in *Robbins v. Shelby County Taxing Dist., supra*. The latter case was subsequently cited at length and approved in *Brennan v. Titusville, supra;* also in *Caldwell v. North Carolina, supra*, where the court said (L. Ed., 340):

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states: that all are taxed alike. But that does not meet the difficulty. *Interstate commerce can not be taxed at all, even though the same amount of tax should be laid on domestic commerce*, or that which is carried on solely within the state. This was decided in the case of *State Freight Tax*, 15 Wall., 232, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. Ed., 146." (Emphasis ours.)

11.

Concluding comment as to opinion of the Court of Appeals of Kentucky.

We do not like to criticize the opinion rendered by the Court of Appeals of Kentucky in this case, but we desire to call the attention of this court to the following facts in connection therewith:

1. As stated above, the trial court, when it decided against plaintiffs, wrote a long and able opinion, in which, after reviewing the previous utterances of the Court of Appeals and of this court, it expressed the view that the property here had not become part of the mass of property in the state; but that it felt constrained to follow the interpretation of the law of interstate commerce placed upon a somewhat similar state of facts by the Court of Appeals in the earlier case of *City of Newport* v. *Wagner*. As we have already said, no writ of error has ever been taken in the case last mentioned to this court because the judgment there was not final. (See above.) We shall file a copy of said opinion, if desired.

2. Both *City of Newport* v. *Wagner* and *City of Newport* v. *The French Bros.-Bauer Co.* were decided in favor of appellees in the lower court, which held the ordinances in question to be unconstitutional as a restraint upon interstate commerce.

3. On February 21st, 1919, the United States District Court for the Eastern District of Kentucky, of which Hon. A. M. J. Cochran is the judge, handed down an opinion construing one of the ordinances involved in *City of Newport* v. *Wagner*, *supra*, as applied to a busi-

ness similar to plaintiffs in error, and held the same to be an unconstitutional interference with interstate commerce. The court wrote a scholarly and elaborate opinion, discussing all the Kentucky cases and the decisions of this court, and held that the position of the Kentucky Court of Appeals was not warranted by the facts or by the law. A copy of the court's decree in said case, attested by the clerk of the court, is attached hereto as an Appendix; and a copy of the opinion will be filed, if desired by the court. Our understanding is that the opinion may be printed in the Federal Reporter, but that it is too soon to expect its publication.

4. If this court will take the time to carefully examine the previous decisions of the Kentucky Court of Appeals, on which the opinion here is based (*City of Newport* v. *Wagner* and *City of Newport* v. *French Bros.-Bauer Co.*, *supra*), we believe it will find there much inaccuracy of statement both in the facts and in the law; and further, the decisions of this court have not been rightly interpreted therein. The Court of Appeals has even cited cases to support its conclusions which had already been reversed or disapproved by this court. For instance, *Barrett* v. *City of New York*, 189 Fed., 268, given as an authority in the French Bros.-Bauer Co. case had been reversed by this court over two years before; *Stockard* v. *Morgan*, 105 Tenn., 412, the only case from a state court cited in the French Bros.-Bauer Co. opinion, which we believe was ever carried to this court, had been reversed by this court nearly thirteen years previously; *Osborne* v. *Mobile*, 16 Wall., 479 (21 L. Ed., 470), had been disapproved twenty-eight years before in a later decision by this court in *Leloup* v. *Mobile*, 127 U. S., 640 (32 L. Ed., 311, 314), where it said:

> "In view of the course of decisions which have been made since that time, it is very certain that

such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states."

12.

This court is not in any way bound by the opinions of the Court of Appeals.

We submit that, after a consideration of all the Kentucky cases, this court will reach the opinion that the Court of Appeals of that state has not correctly interpreted or applied the law to the facts herein, and that it is the only court in that state which has construed the law in such a manner. We submit, also, that this court is not in any manner bound by such interpretation, inasmuch as it involves an infraction of a right secured to plaintiffs in error by the Constitution of the United States.

Trust Co. v. City of Omaha, 230 U. S., 100 (57 L. Ed., 1410).

We respectfully pray, therefore, that the judgment of the Court of Appeals of Kentucky may be reversed.

HARRY BRENT MACKOY,
Counsel for Plaintiffs in Error.

WILLIAM H. MACKOY,
Of Counsel.

Signed this ——— day of March, 1919.

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Counsel for Plaintiffs in Error.

APPENDIX.

DECREE.

(Entered and Filed February 21, 1919.)

United States District Court, Eastern District of Kentucky.

HOWARD HECKERMAN and WILLIAM F. HECKERMAN, partners doing business under the name of Queen City Bottling Works,

Plaintiffs,

No. 3054. vs.

CITY OF NEWPORT, a municipal corporation of the second class under the laws of the State of Kentucky,

Defendants.

The decree heretofore entered on the 5th day of December, A. D. 1918, is now withdrawn, and this decree shall be entered in lieu thereof. This cause coming on for final hearing on the pleadings, evidence and arguments of counsel, and being submitted to the Court, on consideration thereof, the Court finds that the ordinance of the City of Newport adopted on the 1st day of April, 1912, entitled, "An Ordinance requiring persons, corporations and companies carrying on occupations, business and practicing their professions in the City of Newport, Kentucky, to take out a license tax therefor and prescribing a penalty for a failure of such persons, corporations or companies so to do," and amendments thereto, set up in the petition herein, in so far as it attempts to impose a business license tax upon plaintiffs herein is invalid, illegal and unconstitutional, and that the provisions of said ordinance and amendments thereto, in so far as it attempts to impose a tax upon the plaintiff's privilege of doing business, are an unlawful restraint upon, regulation of, and interference with interstate business, and as applied to said bus-

iness is invalid, illegal and unconstitutional, and in contravention of Article I, Section 8, paragraph 3 of the Constitution of the United States.

Wherefore, the court finds on the issues joined for the plaintiffs, and that plaintiffs are entitled to the relief prayed for. It is therefore, on motion of the plaintiffs, adjudged and decree that the injunction heretofore granted in this action be and the same is now hereby made perpetual.

A. M. J. Cochran, Judge.

The United States of America, Eastern District of Kentucky, ss.

I, J. W. Menzies, Clerk of the United States District Court, for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of a decree herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said Court at Covington, Ky., this 21st day of February, A. D. 1919, and of the Independence of the United States of America the 143rd Year.

(Seal.)

J. W. Menzies, Clerk,
By O. M. Mitchel, D. C.